Supreme Court, U.S.
FILED

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No. 02 167

In The

Supreme Court of the United States

LYN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT,

Petitioner,

v.

AMERICAN AIRLINES, INC. and SABRE GROUP, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Lyn-Lea Travel contracted with respondent American Airlines, Inc. ("American") to use its Sabre computer reservation system ("CRS") by which Lyn-Lea Travel could book car rentals, hotel reservations, cruises, and air travel. Because of American's actions, Lyn-Lea Travel sued for (1) common law tortious interference with business relationships, (2) deceptive trade practices, (3) common law fraud, and (4) breach of the common law duty of good faith and fair dealing. After American transferred ownership of the Sabre CRS to respondent Sabre Group, Inc. ("Sabre"), Lyn-Lea Travel made similar claims against Sabre.

The Fifth Circuit held that these claims related to respondents' prices and services, and were therefore pre-empted by the Airline Deregulation Act, 49 U.S.C. § 41713(b). The question presented here is:

Does the Airline Deregulation Act pre-empt a company's wrongful actions in commercial conduct unrelated to air travel, simply because that company also transports passengers and cargo by air and, if not, should the Court correct the Fifth Circuit's expansive reading of its pre-emption jurisprudence?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties before the Court are those identified in the caption. Stephen Gardner was an appellant below but is not a petitioner herein.

Petitioner Lyn-Lea Travel Corp. d/b/a First Class International Travel Management states that it has no corporate parents, and that no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Lyn-Lea Travel Corp. d/b/a First Class International Travel Management ("Lyn-Lea Travel") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 283 F.3d 282, App. 1. The Court of Appeals denied respondents' timely motion for rehearing in an unpublished order, App. 56. The district court's unpublished opinion partially granting respondents' motion for summary judgment is reprinted at App. 30 and its unpublished Final Judgment is reprinted at App. 22.

JURISDICTION

The district court issued a Memorandum Opinion and Order, granting respondents' motion for summary judgment in part, App. 30, and entered its Final Judgment on September 28, 2000, App. 22. Petitioner appealed. The Fifth Circuit affirmed the grant of partial summary judgment in an opinion filed February 13, 2002. App. 1. Respondents' timely motion for rehearing was denied on April 29, 2002. App. 56. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the denial of rehearing.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The Airline Deregulation Act, 49 U.S.C. § 41713(b) ("ADA"), provides in pertinent part that:

> **(b) Pre-emption. – (1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

STATEMENT OF THE CASE

In holding that petitioner's state law claims against respondents were pre-empted by the Airline Deregulation Act ("ADA"), the Fifth Circuit ignored this Court's jurisprudence on ADA pre-emption. It also exacerbated an existing conflict between the circuits – whether the ADA pre-emption language should be given an expansive or strict interpretation.

Lyn-Lea Travel is a travel agency. It sued respondent American, seeking damages and injunctive relief based on American's breach of its agreement to provide Lyn-Lea Travel an airline, hotel, and rental car computer reservation system ("CRS") and to give Lyn-Lea Travel preferred customer status in booking flights. Lyn-Lea Travel sought

relief for breach of contract, violations of the Texas Deceptive Trade Practices Act, and common law fraud. Lyn-Lea Travel later amended its complaint to make additional allegations and seek additional relief for American's intentional interference with Lyn-Lea Travel's business relationships with its customers. App. 4; App. 31-34. After American transferred the Sabre CRS to respondent Sabre, Lyn-Lea Travel made similar claims against Sabre.

The district court partially granted respondents' motion for summary judgment based on its determination that the Airline Deregulation Act, 49 U.S.C. § 41713(b) ("ADA"), pre-empted Lyn-Lea Travel's claims for (1) common law tortious interference with business relationships, (2) deceptive trade practices, (3) common law fraud, and (4) breach of the common law duty of good faith and fair dealing, because they were all related to American's rates and/or services. App. 47-51. This put an end to Lyn-Lea Travel's affirmative claims. The sole remaining aspect of the case was the counterclaim by respondent Sabre. The district court later ruled that several of Lyn-Lea Travel's affirmative defenses were also pre-empted by the ADA. App. 27. Based on these rulings, the district court entered Final Judgment on September 28, 2000. App. 22.

The Fifth Circuit affirmed the summary judgment on Lyn-Lea Travel's affirmative claims, agreeing with the district court that the ADA pre-empted those claims. The Fifth Circuit stated:

> Although *Wolens* might be interpreted to permit the litigation of extra-contractual common law business torts that do not directly involve airline passengers, we think the better reading of the decision requires preemption. The majority opinion repeatedly singles out common law contract

> actions as not being preempted, notwithstanding complaints by both dissenters that contract and fraud-based claims often overlap. See *Wolens*, 513 U.S. at 236, 247-49, 115 S.Ct. at 827-28, 832-34 (Stevens, J., and O'Connor, J., separately dissenting). *Wolens* also expresses the ADA's purpose "to leave largely to airlines themselves, *and not at all to States*, the selection and design of market mechanisms appropriate to the furnishing of airline transportation services...." *Id.* at 227, 115 S.Ct. at 823 (emphasis added). While some airline business dealings undoubtedly do not "relate to" prices, routes and services, the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns. Lyn-Lea's claims are ADA-preempted because they have a "connection with" American's prices and services.

App. 10.

The Fifth Circuit reversed the district court as to the pre-emption of Lyn-Lea Travel's affirmative defenses. App. 14. Respondents moved for rehearing on that reversal, but the court denied rehearing without opinion on April 29, 2002. App. 56. The Fifth Circuit's reversal of the district court on the affirmative defenses is not the subject of this petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit misread the Court's limited jurisprudence on pre-emption by the ADA and therefore expanded pre-emption beyond the statute, and anything envisioned by Congress and explained by this Court. The

Court should grant this writ and clarify the nature of ADA pre-emption.

In the nearly 25 years since Congress passed the ADA, the Court has only had two occasions to consider its pre-emptive effect. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (herein, "*Morales*") and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (herein, "*Wolens*").

There is now a conflict of the circuits regarding the scope of ADA pre-emption and regarding the application of these two opinions. Lyn-Lea Travel urges the Court to resolve this conflict and to clarify ADA pre-emption.

General presumption against pre-emption

Because the States have traditionally occupied the fields of law that the Fifth Circuit pre-empted, any analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229 (1947). This deference was not superseded by Congress's adoption of the ADA. *See De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806, 813 (1997).[1]

The Court's ADA pre-emption jurisprudence

The Court's first opportunity to apply this standard came with *Morales*, which involved advertising guidelines issued by state attorneys general. *Morales*, 504 U.S. at 379. Finding that "it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares," the Court held that portions

of the guidelines were pre-empted by ADA. *Morales*, 504 U.S. at 391.

The Court next considered ADA pre-emption in *Wolens*, which was a private lawsuit regarding frequent flyer programs. *Wolens*, 513 U.S. at 222. Noting that "*Morales* also left room for state actions 'too tenuous, remote, or peripheral . . . to have pre-emptive effect,'" *Wolens*, 513 U.S. at 224, the Court considered the scope of ADA pre-emption under the facts of that case.

In *Wolens*, the Court – noting, as it had in *Morales*, that the Department of Transportation ("DOT") had an administrative process for investigating unfair and deceptive practices – held that the ADA pre-empted a state consumer protection law claim for misrepresentation of frequent flier programs, but that it did not pre-empt enforcement of state contract law. *Wolens*, 513 U.S. at 228 fn. 4, 233; *Morales*, 504 U.S. at 390-391.

The Court also noted that DOT did not have a similar administrative process for adjudication of private contract disputes, and that there was no indication of Congressional intent to create such a process. *Wolens*, 513 U.S. at 232.[1]

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[1] Lyn-Lea Travel's own experience at DOT demonstrates that there is no DOT process. On June 17, 1998, Lyn-Lea Travel filed an administrative complaint with DOT based on the claims that the lower courts pre-empted, seeking an enforcement action and damages. *Lyn-Lea Travel Corp. v. American Airlines, Inc. & The SABRE Group, Inc.*, DOT Docket OST-98-3963. As of today, DOT has taken no action. *See* http://dms.dot.gov/.

The Court observed that "in our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'" *Wolens*, 513 U.S. at 234-235.

The Court's ERISA pre-emption jurisprudence

The need for "a closer working out" at this time is underscored by developments in the Court's jurisprudence on pre-emption with respect to the Employee Retirement Income Security Act of 1974 ("ERISA"). The broad pre-emptive scope applied to the ADA was in significant measure based on the Court's ERISA decisions, because of a similarity of words describing the pre-emptive scope ("relate to" in ERISA and "relating to" in ADA). *Morales*, 504 U.S. at 383 *et seq.*; *Wolens*, 513 U.S. at 223.

In the years since *Wolens*, the Court has had several opportunities to revisit ERISA pre-emption. For example, the Court corrected a lower court's "expansive and literal interpretation" of ERISA's pre-emption language. *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806, 812 (1997). In another case, Justice Scalia, the author of the majority opinion in *Morales*, noted in a concurring opinion that the Court should clarify that "relates to" in the ERISA pre-emption clause, should be interpreted "as a reference to our ordinary pre-emption jurisprudence." *Egelhoff v. Egelhoff*, ___ U.S. ___, 121 S.Ct. 1322 (2001).

State law claims pre-empted in this case

The Court should take this opportunity to clarify the pre-emptive scope of the ADA. Lyn-Lea Travel's claims are

a proper case for this clarification. Its claims are for (1) common law tortious interference with business relationships, (2) deceptive trade practices, (3) common law fraud, and (4) breach of the common law duty of good faith and fair dealing. App. 4; App. 31-34.

Lyn-Lea Travel does not seek to enforce state-law airline advertising guidelines against respondents, unlike the attorneys general in *Morales*.

Lyn-Lea Travel does not seek to apply the Texas deceptive trade practices law to American's frequent flier programs, unlike the consumers in *Wolens*.

Lyn-Lea Travel does not seek to assert any claim that has the "forbidden significant effect" upon the prices, routes, or services of an air carrier. *Morales*, 504 U.S. at 391.

Lyn-Lea Travel merely seeks to hold American and Sabre to the same standards of conduct and competition as the other companies with which Lyn-Lea Travel does business.

Although American is an air carrier, there was nothing in the record, aside from conclusory statements, to demonstrate that forbidden significant effect as an economic matter.

The relationship of Sabre is even more tenuous. Although the Sabre CRS is used to book air travel, it is also used to arrange for rental cars, hotels, cruise ships, and other travel-related matters. *See, e.g., Air Transport Ass'n of America v. P.U.C.*, 833 F.2d 200, 207 (9th Cir. 1987).

The Fifth Circuit's rationale

In its application of ADA pre-emption to this commercial dispute, the Fifth Circuit threw out baby and bathwater alike, by engaging in precisely the "expansive and literal interpretation" of pre-emption language that the Court has warned against. *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806, 812 (1997).

The Fifth Circuit knew that it was engaged in an expansive interpretative effort. Acknowledging that a "very narrow reading of *Wolens* might be said to support Lyn-Lea's position, at least as it pertains to claims of fraud regarding the Sabre contract negotiations," and that "[a]lthough *Wolens* might be interpreted to permit the litigation of extra-contractual common law business torts that do not directly involve airline passengers," App. 10, the Fifth Circuit went beyond the holding of this Court in *Wolens* to find pre-emption.

This unnecessary and unauthorized setting aside of a well established state system for resolving commercial disputes goes beyond the parameters of the ADA, the Congressional design, and this Court's ADA decisions.

The Fifth Circuit based its broadly pre-emptive approach on an earlier case, *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995). In *Hodges*, the Fifth Circuit considered the impact of *Morales* and *Wolens* and arrived at the conclusion that "[i]t is these [contractual] features of air transportation that we believe Congress intended to de-regulate as 'services' and broadly to protect from state regulation." 44 F.3d at 336. The *Hodges* court held that the ADA "does not displace state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft." *Id.*

The unworkable nature of this test is proven by its application to Lyn-Lea Travel. The negligent infliction of property damage in the actual operation of an airplane is, under *Hodges*, not pre-empted. But intentional tortious activities – conducted on the ground and not directly related to air travel – are pre-empted under *Hodges* as applied by the court below.

Conflict of circuits

There is a conflict of circuits over the scope of ADA pre-emption. Other courts of appeal have expressly criticized the *Hodges* standard.

In *Taj Mahal Travel v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998), the Third Circuit rejected *Hodges* and expressly adopted the approach of the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998).

In *Charas*, the court of appeals noted that the *Hodges* standard is "as elusive as it is unworkable," and expressly rejected it, instead requiring that a "court examine ***whether the state laws underlying the claims frustrate the goal of economic deregulation by interfering with the forces of competition.***" 160 F.3d at 1263 [emphasis added].

At least two courts have adopted the *Hodges* formulation. *Smith v. Comair*, 134 F.3d 254, 259 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996).

Three justices of the Court dissented from an earlier denial of a certiorari petition, recognizing the need to

"provide needed clarification on this discrete and important issue of statutory interpretation." *Northwest Airlines, Inc. v. Duncan*, ___ U.S. ___, 121 S.Ct. 650 (2000).

Lyn-Lea Travel's case presents the right opportunity for the Court to provide this clarification. In its decision below, the Fifth Circuit expanded on *Morales* and *Wolens*, and passed beyond the limits of ADA pre-emption.

The Fifth Circuit's decision is thus in conflict with both the earlier decisions of this Court and with the decisions of other courts of appeal.

It is now time for the "closer working out" contemplated in *Wolens*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11174

LYN-LEA TRAVEL CORP.
d/b/a FIRST CLASS INTERNATIONAL
TRAVEL MANAGEMENT,

Plaintiff-Counter-Defendant-Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant-Counter-Claimant-Appellee,

SABRE GROUP, INC.,

Intervenor Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Feb. 13, 2002)

Before JONES, SMITH and DeMOSS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Lyn-Lea Travel, Inc. appeals an adverse judgment on its claims against American Airlines for reducing the profitability of a travel agent booking contract. The district court determined that the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), preempted all of Lyn-Lea's state-law claims as well as Lyn-Lea's fraudulent inducement defense to a breach of contract counterclaim. On this major issue, we conclude that affirmative state law claims against American are preempted, but that Lyn-Lea's defenses to its contract with American's subsidiary are not. A partial remand is required. The magistrate judge's rulings on procedural and sanctions issues are affirmed.

I. Background

A. Factual Background

Lyn-Lea is a travel agency formerly authorized to sell airline tickets for American pursuant to the terms of an Airline Reporting Commission Reporting Agreement (the "ARC Agreement"). The ARC Agreement required American to pay Lyn-Lea commissions for booking flights [ ] in accordance with American's published commission schedule. The ARC Agreement permitted American to modify its commission schedule at any time.

In 1994, Lyn-Lea purchased a competing travel agency, Air-O Travel. At the time of this purchase, Air-O Travel was contractually obliged to use American's computer reservation system (the "Sabre CRS"). In order to reduce the booking obligations assumed in the purchase of

Air-O Travel, Lyn-Lea began negotiating a new CRS agreement with American, through American's Sabre Travel Information Network Division ("STIN"). On December 7, 1994, Lyn-Lea and American executed a new CRS lease agreement (the "Sabre Agreement"). The Sabre Agreement provided for Lyn-Lea's lease of four Sabre CRS terminals from STIN.[1] The Sabre Agreement also released Lyn-Lea from Air-O Travel's prior CRS obligations, but required Lyn-Lea to use the Sabre CRS terminals for at least 1200 transactions per month.

On February 10, 1995, American announced modifications to its domestic commission schedule that dramatically reduced the commissions paid to travel agencies. Lyn-Lea's main contention in this lawsuit is that American knew, at the time it negotiated the Sabre CRS Agreement, that it was about to reduce commissions and should have disclosed the impending changes. Lyn-Lea contends that the new commission schedule severely damaged Lyn-Lea's business and prevented its fulfillment of the Sabre Agreement. Had Lyn-Lea known of the impending reductions in commissions, it would not have entered into the Sabre CRS Agreement.

On March 1, 1996, American sent Lyn-Lea an invoice for amounts due under the terms of the Sabre CRS Agreement. Lyn-Lea refused to pay. American terminated the agreement with Lyn-Lea, demanded full payment, and

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[1] Sabre CRS terminals are required to book flights on American. The CRS terminals may also be used to reserve hotel rooms and rental cars.

disconnected the CRS terminals leased by Lyn-Lea. Lyn-Lea allegedly lost several clients because it could no longer book American flights.

B. Procedural Background

Lyn-Lea promptly filed suit against American seeking damages for tortious interference with business relationships, breach of contract, fraud, and violations of the Texas Deceptive Trade Practices Act. American counterclaimed for Lyn-Lea's alleged breach of the Sabre CRS Agreement. On March 21, 1997, Lyn-Lea and American consented to trial before Magistrate Judge Boyle pursuant to 28 U.S.C. § 636.

American and Sabre[2] filed a joint motion for summary judgment arguing, inter alia, that Lyn-Lea's claims were preempted by the ADA. Lyn-Lea objected to Appellees' preemption argument on the ground that neither American nor Sabre had pleaded preemption as an affirmative defense. In response, American requested, and the magistrate judge approved, an amendment to its answer that properly pled preemption.

The magistrate judge granted summary judgment on all of Lyn-Lea's claims, finding insufficient evidence to support Lyn-Lea's breach of contract claim and preemption of its remaining claims by the ADA. In a later order, Lyn-Lea's fraudulent inducement defense to Sabre's

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[2] Sabre Group, Inc. ("Sabre"), "spun-off" by American during the course of this litigation, was assigned all rights to the Sabre CRS Agreement. Sabre succeeded American as defendant and counterplaintiff in this suit.

counterclaim was also dismissed on the basis of ADA preemption. The only claim left for trial was Sabre's breach of contract counterclaim.

As the case went on, the court sanctioned Lyn-Lea and its counsel, Stephen Gardner, for violating protective orders relating to confidential documents produced during discovery. The court further penalized Gardner pursuant to 28 U.S.C. § 1927 for "unreasonably and vexatiously" multiplying court proceedings. Not surprisingly, Lyn-Lea moved to rescind its consent to proceeding before the magistrate judge. Just as predictably, she refused relief.

The parties then settled Sabre's counterclaim. On September 28, 2000, the court entered an agreed Final Judgment subject to the court's resolution of Sabre's motion for attorney's [sic] fees. Sabre requested more than $ 280,000 in attorneys' fees for prosecution of its breach of contract claim and its defense against the related claims raised by Lyn-Lea. The magistrate judge awarded Sabre $ 123,933.69 in attorneys' fees plus $ 30,000 contingent upon Lyn-Lea's unsuccessful appeal.

Lyn-Lea now challenges the orders dismissing its claims and affirmative defense, the contempt and sanctions orders, the attorneys' fees award, and the orders granting leave to amend and denying Lyn-Lea's request to vacate its consent to trial before a magistrate.

II. Discussion

A. ADA Preemption

Lyn-Lea challenges the finding of ADA preemption on procedural and substantive grounds.

1. Leave to Amend

"Whether leave to amend should be granted is entrusted to the sound discretion of the district court. . . . " *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 499 (5th Cir. 1998). Federal Rule of Civil Procedure 15(a) requires the trial court to grant leave to amend "freely," and the language of this rule "evinces a bias in favor of granting leave to amend." *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162 (5th Cir. 1983). The district court must have a "substantial reason" to deny a request for leave to amend. *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985). Notwithstanding these authorities, Lyn-Lea contends that the trial court erred by granting the defendants leave to amend their pleadings because they did not "establish[ ] good cause or any justification for filing amended pleadings long after the deadline for [pleading amendments] had expired." Lyn-Lea's argument is unpersuasive. Preemption is an issue of law whose relevant facts were undisputed in this case. Lyn-Lea was not deprived of discovery. Consequently, the trial court did not abuse its discretion in granting leave to amend. *Quintanilla*, 139 F.3d at 499.

2. ADA Preemption[3]

The ADA is an economic deregulation statute intended to encourage maximum reliance on competitive market forces in the airline industry by freeing airlines from

[3] The district court's summary judgment order is reviewed *de novo*. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc).

restrictive state regulation. *Hodges*, 44 F.3d at 335-36. The statute broadly prevents states from interfering with this goal:

> Except as provided in this subsection, a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1).[4]

The Supreme Court has twice addressed ADA preemption. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995). In *Morales*, the Court explained that the scope of ADA preemption is a question of statutory intent. 504 U.S. at 383, 112 S. Ct. at 2036. Relying on its prior interpretation of similar preemptive language in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a),[5] the Court held that the phrase "relating to rates, routes, or services" in the ADA was "deliberately expansive" and preempted any "state enforcement action having a connection with or reference to

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[4] This clause was originally codified at 49 U.S.C. § 1305(a). In 1994, Congress recodified § 1305(a), and the clause is now found at 49 U.S.C. § 41713(b)(1). As part of the recodification, Congress changed the phrase "rates, routes, or services" to "price, route, or service." Congress did not intend this modification to substantively change existing law. *See* H. Conf. Rep. No. 677, 103rd Cong., 2nd Sess. 83-84 (1994).

[5] ERISA preempts state laws "insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a).

airline 'rates, routes, or services.'" *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037 (citations omitted). The Court observed that "some state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have preemptive effect." 504 U.S. at 390, 112 S. Ct. at 2040. However, the ADA preempts any state action having a "forbidden significant effect upon [airline] fares." 504 U.S. at 388, 112 S. Ct. at 2039-40.

In *Wolens*, the Court expanded upon ADA preemption as a device to protect the deregulation of the airline industry by preventing "application of restrictive state laws." 513 U.S. at 228, 115 S. Ct. at 824. Nevertheless, "the ADA's preemption clause [does not] shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* The ADA does not preempt "state-law-based court adjudication of routine breach-of-contract claims" so long as there is "no enlargement or enhancement [of the contract] based on state laws or policies external to the agreement." 513 U.S. at 232-33, 115 S. Ct. at 826.

This court has also addressed the scope of ADA preemption, holding that the ADA does not preempt state tort actions alleging personal injury resulting from the operation of an aircraft. *Hodges*, 44 F.3d at 340.[6] Other

[6] In support of its holding, the court relied on the ADA's legislative history and cited the following comments made by the Civil Aeronautics Board regarding the scope-of ADA preemption: "preemption extends to all of the economic factors that go into the provision of the quid pro quo for passenger's [sic] fare, including . . . reservation and boarding practices. . . . " *Hodges*, 44 F.3d at 337 (citing 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979)).

provisions of the ADA require airlines to maintain personal injury and property damage insurance coverage for claims resulting from operation of the aircraft. Consequently, ADA preemption is "concerned solely with economic deregulation, not with displacing state tort law." *Id.* at 337.[7]

Unlike the personal injury claims in *Hodges*, which were unrelated to economic deregulation, Lyn-Lea's claims for affirmative relief have a significant relationship to the economic aspects of the airline industry. Lyn-Lea asserts that (1) American intentionally interfered with its business relationships with four customers and an employee, luring the customers away with discounted fares; and (2) American acted fraudulently and deceptively while negotiating the Sabre CRS agreement with Lyn-Lea. The first claim involves American's dealings with customers, while the second relates to enforceability of the Lyn-Lea contract. In other words, by its first claim, Lyn-Lea is seeking the application of Texas common law in a way that would regulate American's pricing policies, commission structure and reservation practices.[8]

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[7] *See* also, *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995) a companion case to *Hodges* involving a state tort claim brought against an airline for negligently allowing a hijacker to board a plane).

[8] Lyn-Lea also argues, without citing supporting authority, that its claims against Sabre cannot be preempted because Sabre is not an air carrier. ADA preemption is not limited to claims brought directly against air carriers. *See Huntleigh Corp. v. La. State Bd. of Private Security Examiners*, 906 F. Supp. 357, 362 (M.D. La. 1995); *Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689, 696-97 (S.D. Tex. 1993); *Marlow v. AMR Services Corp.*, 870 F. Supp. 295, 297-98 (D.

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A very narrow reading of *Wolens* might be said to support Lyn-Lea's position, at least as it pertains to claims of fraud regarding the Sabre contract negotiations. (The interference with business relations claim is plainly preempted because it involves American's prices and services to customers.) *Wolens* specifically preempted a consumer fraud statute, while Lyn-Lea rests its claim on state common law and, even more narrowly, on fraud related to the making of the contract.[9] And *Wolens* concerned programs run by the airline directly with consumers, whereas the contract dispute here pits American/Sabre against a travel agency; Lyn-Lea thus argues that American's "services" were too peripherally affected by a travel agent controversy to be preempted.

Although *Wolens* might be interpreted to permit the litigation of extra-contractual common law business torts that do not directly involve airline passengers, we think the better reading of the decision requires preemption. The majority opinion repeatedly singles out common law contract actions as not being preempted, notwithstanding complaints by both dissenters that contract and fraud-based claims often overlap. *See Wolens*, 513 U.S. at 236, 247-49, 115 S. Ct. at 827-28, 832-34 (Stevens, J., and O'Connor, J., separately dissenting). *Wolens* also expresses the ADA's purpose "to leave largely to airlines themselves, and not at all to States, the selection and design of market mechanisms appropriate to the furnishing of airline

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Haw. 1991). Rather, claims are preempted if they "relate to" the prices, routes or services of an air carrier.

[9] Lyn-Lea admits that *Wolens*' reading of the ADA preempts its claims founded on the Texas Deceptive Trade Practices Act.

transportation services. . . . " 513 U.S. at 227, 115 S. Ct. at 823 (emphasis added). While some airline business dealings undoubtedly do not "relate to" prices, routes and services, the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns. Lyn-Lea's claims are ADA-preempted because they have a "connection with" American's prices and services.

Even before *Wolens*, it was held that similar claims are preempted by the ADA. In *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399 (D. Col. 1989), the court held that the ADA preempted an action based on Colorado law alleging that United Airlines interfered with business relationships by requiring the use of a United-owned CRS system to book flights. The court determined that the CRS system was central to United's services because United required use of the CRS system to book flights. Similarly, American requires use of the Sabre CRS system to book flights, and American's policies relating to the CRS system are connected with the economic aspects of its services. *Frontier*, 758 F. Supp. at 1407-09.

The existence of federal regulations regarding airline CRS services and the legislative history of the ADA provide additional support for the conclusion that the ADA preempts Lyn-Lea's claims. The Department of Transportation, pursuant to regulatory authority under the ADA, has promulgated regulations applicable to airline CRS

systems. *See* 14 C.F.R. § 255 et seq.[10] "Federal efforts to regulate CRS services and uses clearly demonstrate[ ] that the preemption statute should be applied to eliminate the risk that CRS providers could be subject to varying state standards of unlawful competition." *Frontier*, 758 F. Supp. at 1409. The ADA's legislative history also specifically discusses federal regulation of airline CRS services, and this provides "clear and convincing evidence that Congress intended to preempt state law in the regulation of CRS services. . . . " 758 F. Supp. at 1408-09 (quoting H.R.Rep. No. 98-793, at 4 (1984), reprinted in 1984 U.S.C.C.A.N. 2857).[11]

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[10] 14 C.F.R. § 255.1(a) provides:

> The purpose of [this section] is to set forth requirements for the operation by air carriers and their affiliates of computer reservation systems used by travel agents so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation.

[11] Lyn-Lea argues that because CRS systems are not "unique" to the airline industry, they are not airline "services" preempted by the ADA. *Hodges* defined "services" preempted by the ADA as follows:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. . . . Elements of the air carrier service include such items as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant to and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these contractual features of air transportation that we believe Congress intended to de-regulate as "services" and broadly protect from state regulation.

Hodges, 44 F.3d at 336 (citation omitted). There is no requirement of uniqueness in this definition of services. Rather, "preemption extends to all of the economic factors that go into the provision of the *quid pro*

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Finally, Lyn-Lea's claims do not seek to enforce American's self-assumed contractual obligations. Lyn-Lea's breach of contract claim was dismissed by the magistrate judge on other grounds, and Lyn-Lea has not appealed the ruling. Because Lyn-Lea's claims relate to American's prices and services, the claims are preempted by the ADA.

3. Preemption of Lyn-Lea's Affirmative Defense

Lyn-Lea next contends that the trial court erred by dismissing, as preempted, its fraudulent inducement defense to the enforcement of the Sabre CRS agreement.[12] Noting that *Wolens* confined courts "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement," the court determined that Lyn-Lea's fraudulent inducement defense would impermissibly enhance Lyn-Lea's rights apart from the Sabre CRS agreement under state law. Indeed, Wolens cautioned, when it decided that enforcement of air carriers' contracts is not preempted, "'some state-law principles of contract law . . . might well be preempted to the extent

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quo for passenger's [sic] fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing." 44 F.3d at 337 (citation omitted).

[12] Lyn-Lea contends that three of its affirmative defenses (fraudulent inducement, breach of the duty of good faith and fair dealing, and estoppel) were improperly dismissed on the basis of ADA preemption. The court determined that the breach of the duty of good faith and fair dealing and estoppel defenses had been insufficiently pleaded and dismissed both defenses. Lyn-Lea has not challenged this ruling. Therefore, Lyn-Lea's fraudulent inducement defense is the only defense dismissed on the basis of preemption.

they seek to effectuate the State's public policies, rather than the intent of the parties.'" *Wolens*, 513 U.S. at 233 n.8, 115 S. Ct. at 826. We disagree, however, with the magistrate judge's conclusion that Lyn-Lea's fraudulent inducement defense attempts to enhance or enlarge the Sabre CRS Agreement on the basis of state policies external to the agreement.

When pleaded as a defense to a contract, fraudulent inducement is related to the fundamental issue in contract actions: is there an enforceable agreement? A fraudulently induced party has not assented to an agreement because the fraudulent conduct precludes the requisite mutual assent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979). Fraudulent inducement is an elementary concept in the law of contracts, and is intended to shield a party from liability in a contract action only when another party has procured the alleged contract wrongfully. *United States v. Texarkana Trawlers*, 846 F.2d 297, 304 (5th Cir. 1988). The Court reasoned in *Wolens* that because contract law is, at its "core," uniform and non-diverse, there is little risk of inconsistent state adjudication of contractual obligations. 513 U.S. at 219 n.8, 115 S. Ct. at 826. Fraudulent inducement is among those core concepts as it relates to the validity of mutual assent. The defense does not reflect a state policy seeking to expand or enlarge the parties' agreement. Therefore, Lyn-Lea's fraudulent inducement defense is not preempted by the ADA.[13]

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[13] Sabre urges this court to hold that summary judgment should have been granted against Lyn-Lea's fraud claims, whether raised affirmatively or defensively. The magistrate judge did not address the

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B. Sanction Orders

1. Sanctions for Violations of Court Orders

Relying on the magistrate judge's factual findings and recommendations, the district court sanctioned Lyn-Lea and Stephen Gardner, Lyn-Lea's counsel, for violating three protective orders relating to confidential documents obtained during discovery. The magistrate judge found that Stephen Sedgewick [sic], President of Lyn-Lea, had violated the protective orders by revealing the contents of sealed documents to the press. This finding was based on Sedgewick's [sic] own testimony.[14] The magistrate judge also recommended a finding of contempt against Gardner for filing a complaint with the Department of Transportation ("DOT") that quoted portions of the sealed documents and thus expressly violated the court's June 3, 1998 protective order. Gardner acknowledged his inadvertent violation of this order. The magistrate judge recommended entry of a sanction of $ 18,404 against Lyn-Lea and Gardner, jointly and severally, "which amount is the total of all the costs, attorneys' fees and expenses incurred by Defendants in attempting to obtain the compliance of Plaintiff and its representatives with the terms of the protective orders . . . . " Following review of the magistrate judge's findings and recommendations and a *de novo* hearing, the

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merits of this issue. It is prudent to remand for initial consideration in the court most familiar with this case.

[14] Sedgwick admitted that he spoke with 30 or 40 reporters during the course of this litigation. Sedgwick was quoted in one publication regarding the contents of sealed documents, and Sedgwick acknowledged making such statements.

district court found Lyn-Lea and Gardner in contempt and adopted the magistrate judge's recommendations.

Lyn-Lea argues that the district court erred in characterizing the contempt orders as civil rather than criminal in nature. Criminal contempt proceedings require heightened notice and proof, which Lyn-Lea contends were not satisfied in this case. Even if the contempt proceeding is civil in nature, Lyn-Lea argues that the contempt order is not supported by sufficient evidence. Finally, Lyn-Lea contends that it was error to find Gardner jointly and severally liable for the full amount of the contempt award in light of his limited role in the contemptuous conduct.

A contempt order is reviewed for abuse of discretion, and underlying factual findings are reviewed for clear error. *FDIC v. LeGrand*, 43 F.3d 163, 165 (5th Cir. 1995). A contempt order is civil in nature if the purpose of the order is (1) to coerce compliance with a court order or (2) to compensate a party for losses sustained as a result of the contemnor's actions. *Crowe v. Smith*, 151 F.3d 217, 227 (5th Cir. 1998) (citing *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)). The contempt award entered by the district court was intended to compensate Appellees for the costs they incurred in attempting to obtain Lyn-Lea's compliance with the court's protective orders. Therefore, the challenged order is civil in nature, and the heightened procedural requirements attendant to a criminal contempt proceeding are inapplicable.

A party seeking a civil contempt order must demonstrate, by clear and convincing evidence, "(1) that a court order was in effect, (2) that the order required certain conduct by the respondent, and (3) that the respondent

failed to comply with the court's order." *LeGrand*, 43 F.3d at 170 (citing *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992)); *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987). Lyn-Lea does not dispute that the court entered three protective orders relating to confidential documents that were in effect at the time of Sedgwick's and Gardner's actions. However, Lyn-Lea asserts that the orders merely prohibited disclosure of the confidential documents but did not prohibit disclosure of the contents of such documents. Lyn-Lea argues that there is insufficient evidence supporting the contempt order because Appellees "declined to identify a single confidential document disclosed in Lyn-Lea's discussions with the press."

Lyn-Lea's argument is disingenuous. The magistrate judge rejected this argument in her contempt findings, correctly reasoning that Lyn-Lea's reading of the protective orders would render them a nullity. The court's protective orders prohibited the use of the confidential documents for any purpose outside of the litigation, thereby prohibiting revelation of the documents' contents as much as their existence. Sedgwick's and Garner's admissions constitute clear and convincing evidence that Lyn-Lea and Gardner violated the court's protective orders. The district court did not abuse its discretion by entry of the contempt order.

2. Section 1927 Sanctions

The order sanctioning Gardner for "unreasonably and vexatiously" multiplying proceedings pursuant to 28 U.S.C. § 1927 is reviewed for abuse of discretion. *Matta v.*

May, 118 F.3d 410, 413 (5th Cir. 1997).[15] All that is required to support § 1927 sanctions is a determination, supported by the record, that an attorney multiplied proceedings in a case in an unreasonable manner. *Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir. 1991).

The magistrate judge determined that Gardner unreasonably multiplied proceedings by appearing at the scheduled contempt hearing without Sedgwick, a necessary witness. Gardner contends that he did not understand the nature of the hearing in question, and was prepared to proceed without Sedgwick. The magistrate judge rejected this contention, concluding that Gardner was aware that the purpose of the hearing was to determine if Sedgwick should be held in contempt for his statements to the press, and that Gardner's attempt to justify the absence of Sedgwick "wholly lacked credibility." The absence of Sedgwick made it necessary to reschedule the hearing at a later date, thus multiplying proceedings. The magistrate judge did not abuse her discretion in her § 1927 sanction order.

C. Section 636(c) Consent

Lyn-Lea next contends that the court erred by denying its motion, filed almost two years after it consented to

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[15] Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

proceed before a magistrate judge, seeking to rescind its consent. Lyn-Lea argues that its consent was expressly conditioned on its right to appeal to a district judge rather than this court. This court has warned that it will not countenance any rule allowing a party to "express conditional consent" to trial before a magistrate. *Carter v. Sealand Services, Inc.*, 816 F.2d 1018, 1020 (5th Cir. 1987). A referral may only be vacated upon a showing of "extraordinary circumstances". 28 U.S.C. § 636(c)(4). Appellant presented no evidence of any extraordinary circumstances. Therefore, the Magistrate did not abuse her discretion by denying Lyn-Lea's motion to vacate the 636 referral. *Carter*, 816 F.2d at 1021.

D. Attorneys' Fees

After the court entered its summary judgment and contempt orders, the only issue remaining was Sabre's breach of contract counterclaim. Sabre and Lyn-Lea agreed to the entry of a $ 30,000 judgment on this claim, reserving the right to appeal the court's prior rulings. Sabre, as the prevailing party on its written contract, sought an award of $ 282,030.61 in attorneys' fees plus an additional $ 30,000 in fees contingent on Lyn-Lea's unsuccessful appeal. In support of its fee request, Sabre submitted the affidavits of two of its attorneys summarizing the number of hours expended on the litigation and the reasonableness of the fees sought. Redacted billing statements containing only the date and number of hours worked with no description of the nature of the work were attached to the affidavits.

In a detailed opinion, the magistrate judge awarded Sabre $ 123,933.69 plus $ 30,000 in contingent appellate

fees. Lyn-Lea now challenges this award, arguing that (1) Sabre offered insufficient evidence to support the fee award, (2) Sabre failed to segregate hours expended on prosecution of its counterclaim from hours expended in defense of Lyn-Lea's claims, (3) the fee award includes fees incurred prior to Sabre's intervention in this suit, (4) the amount of the award is excessive in light of Sabre's limited recovery, (5) the Johnson factors do not support the amount of the award, and (6) the amount of contingent appellate fees is excessive.

The short answer regarding the fee award is that we have carefully considered Lyn-Lea's arguments opposing the amount, reasonableness, and documentation of the fee award and find no error of Texas law, clear error of fact or abuse of discretion. *See Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 258 F.3d, 345, 353 (5th Cir. 2001); Tex. Civ. Prac. & Rem. Code § 38.001; Hon. Scott A. Brister, Proof of Attorney's Fees in Texas, 24 St. Mary's L.J. 313 (1993). Nevertheless, on the basis of our ruling regarding Sabre's contract claim, we must vacate the award and remand for reconsideration after the magistrate judge reassesses Sabre's contract claim in light of Lyn-Lea's non-preempted defense.

Conclusion

Lyn-Lea's affirmative non-contractual claims against American are preempted by the ADA. However, Lyn-Lea's fraudulent inducement defense to enforcement of its contract with Sabre is not preempted. The judgment on the contract and associated attorneys' fee award must accordingly be vacated and remanded for further proceedings. The contempt and sanction orders are affirmed.

Judgment for Sabre on Contract and Attorney's Fees **VACATED** and **REMANDED**.

Contempt order **AFFIRMED**.

Sanction order **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT, Plaintiff, v. AMERICAN AIRLINES, INC., Defendant.	CIVIL ACTION NO. 3:96-CV-2068-BC

FINAL JUDGMENT

(Filed Sep. 28, 2000)

CAME ON for consideration the request for Intervenor/Counter-Claimant Sabre Inc. f/k/a The SABRE Group, Inc. ("Sabre") and Counter-Defendant Lyn-Lea Travel Corp. d/b/a/ First Class International Travel Management ("First Class Travel," and collectively with Sabre, the "Parties") for entry of this Final Judgment. By order dated December 2, 1997, the Court entered summary judgment against First Class Travel and in favor of American Airlines, Inc. and Sabre on all of First Class Travel's affirmative claims for relief. By orders dated September 7 and 29, 1999, the Court rejected as a matter of law all of First Class Travel's affirmative defenses with the exception of First Class Travel's: 1) statute of frauds defense; and 2) lack of capacity defense. To avoid the expense of trial on Sabre's breach of contract counterclaim against First Class Travel, the Parities have requested the Court to enter this Final Judgment. Based on the above Orders, and the agreement of the Parties, the Court is of the opinion that the

request is well taken and should be and is hereby GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that First Class Travel take nothing by its suit, and that Intervenor/Counter-Claimant Sabre recover on its counterclaim against First Class Travel the sum of $30,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sabre recover from First Class Travel the sum of $123,933.69, said sum being the reasonable and necessary attorneys' fees Sabre incurred in prosecuting its counterclaim, and $30,000. in appellate fees contingent on FCI's unsuccessful appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sabre recover postjudgment interest at the rate of 10 percent annum on the above sums from the date hereof until the sums have been paid.

The Parties are allowed such actions, writs and processes as may be necessary in the collection and enforcement of this Judgment. All relief not expressly granted is denied.

This is a FINAL JUDGMENT.

IT IS SO ORDERED.

DATED: September 28, 2000
~~November ___, 1999~~

/s/ Jane J. Boyle
Presiding Judge

APPROVED AS TO FORM AND SUBSTANCE:

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FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT, Plaintiff, v. AMERICAN AIRLINES, INC., Defendant.	CIVIL ACTION NO. 3:96-CV-2068-BC

MEMORANDUM OPINION AND ORDER

(Filed Sep. 29, 1999)

On September 10, 1999, the Court held an additional pre-trial conference to further address the viability of three affirmative defenses pleaded or otherwise asserted by Plaintiff in response to The SABRE Group Inc.'s counter-claim. The issue arises from the request of Defendant American Airlines, Inc. ("American") and Intervenor-Defendant-Counterclaimant The SABRE Group, Inc. ("SABRE") (together, "Defendants") that the Court act either in the context of a Rule 16 hearing or *sua sponte* to strike or eliminate all of Plaintiff's affirmative defenses. Defendants contend that such defenses are either waived for lack of proper pleading and/or are deficient as a matter of law given the Court's earlier summary judgment rulings. At an earlier pretrial conference on September 1, 1999, the Court ruled on many of the affirmative defenses but deferred ruling on the three addressed herein to permit further briefing by the parties and further consideration by the Court. By consent of the parties, the pretrial hearing was conducted telephonically, and all parties

appeared through counsel. After reviewing and considering the briefs and additional letter briefs of the parties, the summary judgment evidence previously adduced by the parties, the Court's prior summary judgment rulings, and the argument of counsel, the Court finds and concludes as follows:

1. At issue is Plaintiff's assertion of three affirmative defenses: fraud in the inducement of the computer reservation services agreement at issue (the "CRS agreement"); breach of an asserted duty of good faith and fair dealing; and estoppel. As explained by Plaintiff in its brief and its argument, all three rest on the contention that, at the time of the negotiation of the CRS agreement, American was obligated, but failed to disclose to Plaintiff, American's allegedly then-known plans to reduce commissions paid to travel agents on domestic airfares.

2. As an initial matter, Defendants assert, and the Court finds and concludes, that Plaintiff's pleadings do not support its present assertion of the latter two defenses. Plaintiff's response to the counterclaim contains no allegations of the existence or breach of a duty of good faith and fair dealing. Plaintiff argues that these matters are implicitly alleged in its affirmative defense of fraud on the theory that the asserted duty to disclose the claimed plan to reduce commissions necessarily arises from a duty of good faith and fair dealing. Stated otherwise, Plaintiff asserts that breach of the duty of good faith and fair dealing is an element of its asserted fraud defense. However, the Court has found no authority for the proposition that breach of this implied covenant is treated under applicable Texas law as an element of fraud. To the contrary, Texas law treats breach of this implied duty as a

separate cause of action or defense. With respect to estoppel, Plaintiff asserts that its allegation that Defendants are barred from maintaining the counterclaim by their own unspecified conduct is, without more, sufficient to state an estoppel defense. The Court notes that estoppel is recognized as an express and discrete affirmative defense under both the federal and state rules of procedure and concludes that Plaintiff has failed to adequately set forth such a defense.

3. Irrespective of the foregoing, the Court finds and concludes that all three affirmative defenses are preempted by federal law. In this regard, the Court finds, as an initial matter, that each of the defenses is in fact urged and intended by Plaintiff here as an affirmative defense, *i.e.*, a defense resting on alleged facts independent of the contract that are asserted in avoidance. *See, e.g., Hays Consol. Indep. Sch. Dist. v. Valero Transmission Co.*, 645 S.W.2d 542 (Tex. App. – Austin 1982, ref'd n.r.e.). Here, Plaintiff acknowledges that the common essence of each defense is that Plaintiff was tricked by American's silence into signing an otherwise undisputed contract. Indeed, Plaintiff has confirmed that the conduct implicated in these defenses is identical to that implicated in those of its affirmative claims addressing the negotiation of the CRS agreement. For the reasons set out in this Court's prior Order granting Defendants summary judgment and dismissing those claims, the Court found such claims preempted under the Airline Deregulation Act ("ADA").

4. The issue presented to the Court is whether the ADA operates to preempt Plaintiff's affirmative defenses that are based on the same conduct. In this regard, the Court notes that the ADA preemption provision does not expressly extend to affirmative defenses. The statute

speaks more broadly to the enforcement or enactment of state law or other provisions having the force and effect of law. As construed by the Supreme Court in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed. 2d 715 (1995), the statute operates to prevent states from imposing their own substantive standards with respect to rates, routes, or services of an air carrier. In *Wolens*, the Court drew a distinction between state-imposed duties and those voluntarily undertaken by an air carrier.. The Court held that the statute did not preclude routine breach of contract cases, but confined courts in such actions "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 115 S.Ct. at 826. The Court finds that, by its affirmative defenses, Plaintiff here is seeking to avoid the contract based upon state policies and state common law external to the agreement. For the same reasons as set forth in this Court's prior summary judgment Order addressing Plaintiff's affirmative claims, the Court finds that allowing Plaintiff to proceed on its affirmative defenses would effectively sanction state regulation of conduct within the preemptive scope of the ADA.

5. The Court finds further support for federal preemption in 49 U.S.C. § 41712, which expressly authorizes the DOT to investigate and act upon instances of unfair or deceptive conduct on the part of air carriers. *See, e.g., Musson Theatrical, Inc. v. Federal Express, Corp.*, 89 F.3d 1244 (6th Cir. 1996). In this regard, Plaintiff is not without recourse on its claims that American acted deceptively in negotiating the CRS agreement, as it can urge the DOT to initiate and [sic] enforcement action under § 41712.

6. Having earlier determined, on the basis of a substantial summary judgment record and extensive

briefing by the parties, that Plaintiff's affirmative claims based on the alleged deceptive conduct of American were preempted, the Court concludes that it is procedurally appropriate to summarily rule out, as preempted, Plaintiff's affirmative defenses based upon the identical conduct. *See, e.g., Pitts v. Dow Chem. Co.*, 859 F.Supp. 543, 551-52 (M.D. Ala 1994); *Kennan v. Dow Chem. Co.*, 717 F.Supp. 799, 812 (M.D. Fla 1989); *see also, Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990); *First City, Texas – Beaumont, N.A. v. Treece*, 848 F.Supp. 727, 742 (E.D. Tex. 1994).

7. Accordingly, for each of the foregoing reasons, the Court hereby strikes and precludes as preempted, Plaintiff's affirmative defenses of fraud, breach of the duty of good faith and fair dealing, and estoppel.

8. SABRE's Counterclaim remains specially set for trial on November 15, 1999. The Court's current scheduling order remains in effect.

Signed this 29th day of September 1999.

/s/ Jane J. Boyle
UNITED STATES MAGISTRATE
JUDGE JANE J. BOYLE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT,	§	**CA3:96-CV-2068-BC**
Plaintiff,	§	
v.	§	
AMERICAN AIRLINES, INC.,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed Dec. 2, 1997)

Before the court is Defendant's and Intervenor's Motion for Summary Judgment, filed October 2, 1997. Having reviewed the pertinent pleadings the undersigned **GRANTS** the motion in part, and **DENIES** the motion in part, for the reasons that follow.

I. Background[1]

In 1983, First Class Travel International Travel Management ("FCI") began operating a travel agency. FCI

[1] These uncontested background facts are taken from the following: plaintiff's Second Am. Compl., filed June 3, 1997; Def.'s Mot. for Summ. J., filed October 2, 1997; and Pl.s' Resp. to Def's Mot. for Summ. J., filed October 27, 1997. Unless characterized as a contention, all background facts are undisputed.

sells airfare for many different airlines, including American Airlines, Inc. ("American"). FCI is authorized to sell airline tickets for American pursuant to the terms of an addendum to the Airline Reporting Commission Reporting Agreement ("ARC Agreement"). The ARC Agreement requires American to pay commissions to FCI according to American's published commission structure. The agreement also permits American to modify its commission schedule at any time. In addition to commissions, from time to time, American also paid FCI "override" payments.

In late 1994, to expand its business, FCI decided to buy a travel agency known as "Air-O Travel." The negotiations surrounding this transaction were conducted by Steven Sedgewick, The President of FCI, and Mary Earhart ("Earhart"), the owner of Air-O Travel. During these negotiations, FCI discovered that Air-O Travel was contractually obligated to use the SABRE Computerized Reservation System ("SABRE CRS"), the reservation system affiliated with America. Conversely, FCI was contractually obligated to utilize WorldSpan, a reservation system affiliated with Delta. FCI intended to honor its agreement with WorldSpan and did not want to assume responsibility for Air-O Travel's SABRE agreement. Consequently, FCI began negotiating with the SABRE Travel Information Network ("STIN")[2] in an effort to reduce FCI's obligations under the SABRE agreement. On December 7, 1994, STIN and FCI ultimately signed a SABRE agreement whereby STIN agreed to supply FCI

[2] At the time of these negotiations, STIN was a division of American. However, currently STIN is operated as a division of SABRE, a separate subsidiary of AMR Corporation.

four terminals, rather than eight as required by the Air-O Travel SABRE agreement. Under the SABRE agreement, FCI was required to use the SABRE CRS for at least 1200 transactions per month (300 per terminal) to avoid paying damages under the agreement.

On February 10, 1995, American announced that it decided to modify its domestic commission schedule as of February 27, 1995. Under the new plan, American would cap commissions at $25 for one-way tickets and $50 for round-trip airfare. FCI contends that this modification of the commission structure had an adverse effect on FCI's earnings.

On March 1, 1996, STIN sent FCI an invoice requesting in excess of $20,000 for amounts owed pursuant to the SABRE agreement. FCI did not pay the March invoice. Consequently, in June 1996, STIN terminated the SABRE agreement and now seeks damages of $102,079.17 for breach of contract. FCI contends that this amount of damages was in excess of the agreed to terms.

In early 1997, FCI entered into an exclusive booking agreement with MAI Systems ("MAI"). Prior to entering into this contract with FCI, MAI had entered into an agreement with American that required MAI to book their flights on a SABRE CRS to obtain a discount on their American flights. FCI requested that American waive the SABRE restriction for MAI because FCI no longer had access to the SABRE CRS. However, American refused to waive this condition.

FCI contends that American utilized "waivers and favors" to "steal" FCI's client, Mendoza Dillon. FCI claims that by granting one of FCI's competitors, Nick Lugo

Travel ("Nick Lugo"), favorable discounts, American enabled Nick Lugo to induce Memdoza Dillon to switch travel agencies in August 1997.

Earhart's agreement to sell Air-O Travel to FCI included Earhart's agreement to work for FCI after the purchase. Earhart's employment agreement included a covenant to not compete with FCI. In January of 1996, Earhart left FCI and did not return. On July 3, 1996, FCI and Earhart resolved their dispute and the parties executed a release which dissolved Earhart's covenant to not compete. After the release was signed, Earhart went to work for Sundance Travel. After she left FCI, one of FCI's clients, Sensormedics, decided to follow Earhart and book their future flights through Sundance. Sundance Travel uses the SABRE CRS. FCI contends that American encouraged Earhart to shift FCI's business to a travel agency using a SABRE system in violation of Earhart's covenant to not compete and that its actions constitute tortious interference with a contract.

FCI also contends that in July 1997, defendants tortiously interfered with FCI's relationship with Hyundai Motors ("Hyundai") by offering Hyundai a corporate discount program contingent upon the use of a SABRE system to book the flights.

On July 24, 1996, FCI filed suit against American Airlines. On May 6, 1997, SABRE filed a motion to intervene. On June 3, 1997, FCI filed a Second Amended Complaint, seeking damages for tortious interference, breach of contract, fraud, violations of the Texas Deceptive

Trade Practices Act ("DTPA") and requesting a declaratory judgment.[3] On July 7, 1997, SABRE filed a counterclaim against FCI seeking damages for breach of contract. On October 2, 1997, American and SABRE filed the instant motion requesting summary judgment on (1) all of FCI's claims and (2) SABRE's claim against FCI for breach of contract.

II. Analysis

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Only disputes about those facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant to prove that no genuine issues of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the movant for summary judgment need not support the motion with evidence negating the opponent's case; rather, the movant may satisfy its burden by showing that there

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[3] FCI also raises a claim for breach of good faith and fair dealing. This claim is not mentioned in FCI's Second Am. Compl., but was raised in FCI's Resp. to Def.'s Mot. for Summ. J. This claim is addressed later in this opinion.

is an absence of evidence to support the non-movant's case. *Id.; Little,* 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little,* 37 F.3d at 1075 (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 871-73, 110 S. Ct. 3177, 3180 (1990); *Hopper v. Frank,* 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.,* 14 F.3d 1082, 1086 (5th Cir. 1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita,* 475 U.S. at 587, 106 S. Ct. at 1356 (*quoting* FED. R. CIV. P. 56(e)).

In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.,* 83 F.3d 96, 98 (5th Cir. 1996) (per curiam); *Gremillion v. Gulf Coast Catering Co.,* 904 F.2d 290, 292 (5th Cir. 1990). If the moving party seeks to establish the absence of a material fact through the submission of affidavits, depositions, admissions, or responses to interrogatories, the non-movant may not rely solely on mere allegations or denials. Rather, the non-movant must demonstrate the existence of an issue of material fact necessitating resolution by trial through similar evidentiary materials setting forth specific facts.

FED. R. CIV. P. 56(e); *Lechuga v. Southern Pac. Transp. Co.*, 949 F.2d 790, 794 (5th Cir. 1981).

It is with this standard in mind that the undersigned reviews the issues raised by defendants in their motion.

B. Preemption

In their motion for summary judgment, the defendants and intervenors ("defendants") argue that the plaintiff's state law claims for tortious interference, deceptive trade practices and common law fraud are preempted by the Airline Deregulation Act ("ADA").[4] The ADA provides, in pertinent part, "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . . " 49 U.S.C.A. § 41713(c)(1) (1997).[5] Thus, the first issue for this court is whether the plaintiff's state law claims for tortious interference, deceptive trade practices common law fraud, and breach of the duty of good faith and fair dealing are preempted under the ADA.

In ruling on this issue, this court is guided by several recent decisions dealing with preemption under ADA. The Untied States Supreme Court first addressed the issue of ADA preemption in *Morales v. Trans World Airlines, Inc.*,

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[4] In their reply, defendants also contend that FCI's claims for breach of the duty of good faith and fair dealing are preempted.

[5] The former citation to this cite, 49 U.S.C.A. § 1305(a)(1), is referred to in many of the ADA preemption cases. The clause was revised by Congress in 1994, but Congress did not intend the revision to make a substantive change. Pub.L. 103-272, § 1(a), 108 Sat. 745.

504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). In Morales, the National Association of Attorneys General ("NAAG") promulgated guidelines which purported to govern the content and format of airline advertising. After seven of the attorneys general initiated attempts to enforce the guidelines under the States' general consumer protection laws, the airlines filed suit in Federal District Court contending that state regulation of fare advertisements is preempted by the ADA. By analogizing to ERISA, the Morales Court broadly construed the ADA words "relating to rates, routes, or services" to conclude that the ADA will preempt state enforcement actions "having a connection with or reference to airline 'rates, routes, or services.'" *Morales,* 504 U.S. at 384, 112 S. Ct. at 2037. The Court ultimately concluded that the NAAG guidelines on fare advertising related to rates and thus were preempted because they "establish binding requirements as to how tickets may be marketed" and imposed obligations that "would have a significant impact . . . upon the fares [the airlines] charge. *Id.* at 388-90, 112 S. Ct. at 2039, 2040. However, the Supreme Court also explained that "[s]ome state actions may affect [airline rates or services] in too tenuous, remote, or peripheral a manner" to be preempted. *Id.* at 388, 112 S. Ct. at 2040 (quoting *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 100 n. 21, 103 S. Ct. 2890, 2901, n. 21, 77 L. Ed. 2d 490 (1983)).

The Supreme Court revisited preemption under the ADA in *American Airline, Inc. v. Wolens,* 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995). In Wolens, members of the airline's frequent flyer program filed suit challenging the airline's retroactive changes in the terms and conditions of the program. Specifically, the plaintiffs alleged that by imposing capacity controls and blackout

dates to previously earned mileage credits, the airline breached its contract with the plaintiffs and violated the Illinois Consumer Fraud and Deceptive Business Practices Act. In its Opinion, the Court first observed that the plaintiffs claims clearly related to rates and services. Specifically, the Court noted that the mileage credits related to the airline's "rates" and the capacity controls and blackout dates related to access to flights and hence to the airline's "services." *Id.* at 226, 115 S. Ct. at 823. However, this determination did not end the Court's inquiry.

Once the Court determined that the plaintiffs' claims related to rates and services, the Court next had to interpret the ADA words "enact or enforce any law" as provided in the clause "[N]o state shall enact or enforce any law . . . related to a price, route or service. . . . " 49 U.S.CA. § 41713(b)(1). Specifically, the Court considered whether the plaintiff's claims for breach of contract and violations of the Illinois Consumer Fraud Act constituted the enactment or enforcement of a state law and were thus preempted by the ADA. The Court concluded that the claims under the Illinois Consumer Fraud Act were preempted because the act allowed the state to "police the marketing practices of the airlines." *Wolens,* 513 U.S. at 227, 115 S. Ct. at 823. In contrast, the Wolens Court determined that plaintiffs' breach of contract claims were not preempted because the ADA preemption clause was not designed to "shelter airlines from suits . . . seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228-29, 115 S. Ct. at 824. The Court later explained that a claim by a party seeking relief from an airline that "dishonored a term the airline itself stipulated" will not be preempted because the ADA will permit

"state-law-based court adjudication of routine breach of contract claims." *Id.* at 232-33, 115 S. Ct. at 826. However, the Court further explained that contract actions seeking to enlarge or enhance the parties' agreement "based on state laws or policies external to the agreement" will not be permitted. *Id.*

After the Supreme Court decided Wolens, the Fifth Circuit explored preemption under the ADA in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc). In Hodges, a passenger of an airline was injured during his flight when another passenger opened an overhead compartment and caused a case of rum to fall and injure the passenger's arm and wrist. The passenger subsequently sued the airline under the state law theory of negligence. In response, the airline argued that the plaintiff's claim was preempted by the ADA. To resolve this issue, the Hodges Court first needed to determine whether the alleged negligence of the airline was related to "services" as that term is used in § 41713(b)(1) of the ADA.

The Fifth Circuit defined "services" to include "elements of the air carrier service bargain . . . such as ticketing, boarding procedures, [the] provision of food and drink, and baggage handling, in addition to the air transportation itself." *Id.* at 336. The Court explained that this definition of "services" was premised upon its belief that Congress, by enacting the ADA, intended to deregulate the contractual features of air transportation. *Id.* The Hodges Court's interpretation of Congressional intent was based in part on various statements made by the CAB following deregulation. Specifically, the CAB concluded that:

> preemption extends to all of the economic factors that go into the provision of the quid pro quo for [a] passenger's fare, including flight frequency

> and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, [and] bonding and corporate financing.

Id. at 337 (*quoting* 44 Fed.Reg. 9948, 9951 (Feb. 15, 1979)).

However, the Hodges Court also determined that the ADA will not preempt "state tort actions for personal physical injuries or property damage caused by the operation and maintenance of an aircraft" because they do not relate to the economic and contractual features of air transportation.[6] *Id.* at 336. Accordingly, because the plaintiff's claim was one for a personal injury, the Court concluded that plaintiff's tort claim was not preempted by the ADA.

In this case, defendants argue that plaintiff's state law claims for tortious interference, deceptive trade practices and common law fraud relate to rates and services and are therefor preempted. Conversely, plaintiff argues that its claims don to relate to rates and services, or that any such relation is too tenuous, remote and peripheral to warrant preemption. Plaintiff's claims can be divided into two primary categories. The first category involves the claims related to defendants' alleged tortious

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[6] The Hodges Court based this determination on the fact that Congress requires air carriers to maintain insurance to cover passengers' claims for bodily injury and property damage resulting from the operation and maintenance of aircraft. *Hodges,* 44 F.3d at 338 (citing 49 U.S.C.A. § 1371(q) (1994)). By requiring airlines to maintain insurance for these claims, Congress has impliedly made clear that it does not intend § 41713(b)(1) to preempt all state claims for personal injury. *Id.*

interference with several of the plaintiff's business relationships.[7] The second category of claims are those that arise out of the SABRE Agreement and the negotiations that culminated in that agreement.[8]

1. Tortious Interference Claims

The first category of claims arise out of defendants' alleged interference with various business relationships that existed between the plaintiff and its clients. Specifically, plaintiff contends that defendants interfered with its business relationships through the following actions:

1) permitting Nick Lugo Travel to book customers on fares that are greatly lower than those available to plaintiff or the general public; (Pl.'s Second Am. Compl., p. 5-6, Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 11)

2) insisting that MAI use a SABRE agency to obtain corporate discounts with American Airlines; (Second Am. Compl., p. 6, Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 9-10)

3) offering Hyundai Motors a corporate discount program that required the use of SABRE; and (Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 13)[9]

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[7] The first category includes the plaintiff's civil conspiracy claims.

[8] The second category includes the plaintiff's claims for deceptive trade practices, common law fraud, and breach of the duty of good faith and fair dealing. FCI's claim for breach of contract is addressed later in this opinion.

[9] Defendants have objected to this allegation because it is not included in Plaintiff's Second Amended Complaint. See Joint Pre-trial

(Continued on following page)

4) encouraging and assisting Mary Earhart's violation of her covenant to not compete with plaintiff which culminated in the plaintiff's loss of the Sensormedics account. (Pl.'s Second Am. Compl., p. 5, Pl.'s Resp. to Def.'s Mot. for Summ. J., p. 12-13)

In its motion for summary judgment, defendants argue that the state law claims arising out of actions 1-3 are preempted by ADA § 41713(b)(1) because such claims are "related to rates and services." Def.s' Brief in Support of Mot. for Summ. J., p. 5, Def.s' Reply Brief, p. 3, n. 4. In response, plaintiff argues that its tortious interference claims are related to the SABRE CRS business and not to the rates, routes, or services of American, or alternatively, that any connection between the CRS business and the rebates, routes and services is too attenuated to require preemption.[10]

Here, it is clear that defendants' offers, i.e., discounts to Nick Lugo and corporate discount programs contingent upon the use of SABRE to MAI and Hyundai, have a "connection with or reference to" defendants' rates and services. Plaintiff's claim that defendants interfered with

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Order, p. 8. However, since the Court finds that this claim is preempted, the Court need not address this objection.

[10] Plaintiff also argues that its claims against SABRE cannot be preempted because SABRE is not an air carrier. Pl.'s Brief in Resp. to Def.s' Mot. For Summ. J., p. 11. However, this argument is without merit because ADA preemption is not limited to claims against air carriers. *Huntleigh Corp. v. Louisiana State Bd. of Private Security Examiners*, 906 F.Supp. 357, 362 (M.D. La. 1995); *Marlow v. AMR Services Corp.*, 870 F.Supp. 295, 297-98 (D. Haw. 1994); *Continental Airlines, Inc., v. American Airlines, Inc.*, 824 F.Supp. 689, 696-97 (S.D. Tex. 1993).

plaintiff's business relationship by permitting Nick Lugo to book customers on fares greatly lower than those available to plaintiff or the general public clearly has a connection with the "rates" that defendants charge for their airline rickets because such discounts reduce the price of the fare. *See Wolens,* 513 U.S. at 226 (mileage credits from frequent flier program related to rates); *Continental Airlines, Inc.,* 824 F.Supp. at 697 (plaintiff's state-law claims arising out of defendant's Value Pricing Plan were preempted since they had a connection with airline rates).

Similarly, plaintiff's claims based on the offering of corporate discount programs to MAI and Hyundai that were contingent upon the use of SABRE also have a connection with American's rates and services. As explained previously, to the extent that plaintiff's complaints are based on a reduction in airfare to those participating in the corporate discount program, those claims clearly have a connection with an airline's "rates" and are preempted. Similarly, plaintiff's claims arising out of American's requirement that MAI and Hyundai use the SABRE CRS system to obtain corporate discounts also have a connection with "rates" and "services." In *Hodges, supra,* the Fifth Circuit relied, in part, upon various statements by the CAB to define "services" of an airline for purposes of ADA preemption. Specifically, the *Hodges* Court quoted with approval the CAB's conclusion that ADA "preemption extends to all of the economic factors that go into the provision of the quid pro quo for [a] passenger's faire [sic], including . . . reservation . . . practices." *Hodges,* 44 F.3d at 337 (*quoting* 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979)). Here, plaintiff's complaints arising

out of the SABRE CRS are clearly based on the defendants' reservation practices and therefore have a connection with defendants' "services."[11]

In addition, other courts confronted with similar cases have found plaintiffs' common law claims to be preempted by the ADA. *See Virgin Atlantic Airways, Ltd., v. British Airways, PLC*, 872 F.Supp. 52, 59, 66-67 (S.D. N.Y. 1994) (plaintiff's common law claims based on airline's actions in granting rebates and incentives to corporate customers and travel agents only if they purchase a high percentage of their travel requirements from defendant were clearly related to defendant's rates, routes and services and thus preempted by the ADA); *See also Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F.Supp. 1399, 1407-1411 (D. Colo. 1989) (plaintiff's claims arising out of defendant's computer reservation system and its relations with travel agents were preempted by the ADA). Finally, the condition that corporations use the SABRE CRS to obtain discounts has a connection with "rates" and "services" because it relates to access to flights. *Wholen* [sic], 513 U.S. at 226, 115 S.Ct. at 823 (frequent flier program had a connection with "services" because it related to access to flights).

In this case, plaintiff's state-law claims arising out of the defendants' discount programs and requirements that

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[11] Computerized reservation system ("CRS") consist of "computer terminals and printers in travel agents' offices plus telecomunications hook-ups to the airline's master computer." "The terminal in the agent's office displays information about flights, including fares, departure and arrival times, and seat availability. The travel agent can use the equipment to book a flight for the customer and print out the ticket." *United Air Lines, Inc. v. Civil Aeronautices Bd.*, 766 F.2d 1107, 1109 (7th Cir. 1985).

customer use the SABRE CRS to obtain discounts have a connection with the airline's "rates" and "services." Thus, the undersigned must next consider whether FCI's tortious interference claims constitute the "enact[ment] or enforce[ment]" of a state law under the ADA. *Wolens*, 513 U.S. at 226. The Supreme Court has previously explained that laws of general applicability can be preempted under the ADA. *Morales*, 504 U.S. at 386 (comparing preemption under the ADA to ERISA and citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48, 107 S.Ct. 1549, 1552-1553, 95 L.Ed.2d 39 (1987) (common law tort and contract claims preempted)). In *Hodges*, the Fifth Circuit concluded that although federal preemption under the ADA will apply to "certain common law actions 'related to services' of an air carrier, it will not "displace state tort actions for personal physical injuries or property damage caused by the operation or maintenance of an aircraft." *Hodges*, 44 F.3d at 336.[12]

Here, none of these state law tortious interference or conspiracy claims allege personal injury or damage to property resulting from the operation or maintenance of an aircraft. *Hodges*, 44 F.3d at 338; *Trujillo v. American Airlines, Inc.*, 938 F.Supp. 392, 394 (N.D. Tex. 1995), *aff'd*, 98 F.3d 1138 (5th Cir. 1996). Accordingly, FCI's common law claims for tortious interference are preempted by the ADA.[13] However, the tortious interference claim arising out of Mary Earhart's covenant to [sic] not compete does

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[12] See n. 6, *supra*.

[13] The conspiracy claims based on these actions by defendants are also preempted. However, the conspiracy claims based on Earhart's contract are not preempted.

not relate to the "rates" and "services" of an airline. Consequently, this claim is not preempted and is addressed later in this opinion.

2. *Claims Based on the SABRE Agreement Negotiations* (Contract Related Claims)

The second category of claims are those arising out of the SABRE agreement negotiations between plaintiff and American and American's subsequent decision to cap the commissions it pays to travel agents. These contract related claims include the plaintiff's claims for deceptive trade practices, common law fraud and breach of the duty of good faith and fair dealing. Specifically, FCI's claims are based on the following actions and omissions of the defendants:

(1) changing the commission practices by capping commission and changing the override program; (Pl.'s Second Am. Compl., p. 3-4)

(2) failing to disclose their plans to cap commissions paid to travel agents while they were negotiating the SABRE agreement with plaintiff; (Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 28)[14]

(3) failing to offer an actual damages provision in the agreement; and (Id.)

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[14] Plaintiff contends that American's failure to disclose its plans to alter its domestic commission structure constitute breach of contracts, fraud, misrespresentation and a violation of the DTPA.

(4) failing to negotiate fairly and in good faith. (Id. at 29)

In their motion for summary judgment, defendants argue that plaintiff's state law claims for deceptive trade practices, common law fraud, and breach of good faith[15] arising out of the SABRE agreement negotiations are preempted by the ADA. In response, plaintiff argues its claims are not preempted because they do not relate to defendants' "rates" "routes" and "services" and, in *Wolens* [sic], *supra*, the U.S. Supreme Court stated that contract claims will generally not be preempted by the ADA.

Initially, this Court must determine whether the defendants' alleged misconduct has a "connection with or reference to" American's "rates," "routes" or "services." In *Hodges*, the Fifth Circuit defined "services" to encompass all the "[e]lements of the air carrier service bargain include[ing] . . . ticketing." *Hodges*, 44 F.3d at 336 (citation omitted). Travel agents are significant participants in an airline's ticketing practices because they receive commissions from the airlines in exchange for selling an airline's tickets. Consequently, defendants' commission practices have a "connection with" their ticketing practices, which are part of their "services."

Not only are defendants' commission practices related to their "services," as an economic matter, it is clear that the defendants' commission practices also have a significant effect on American's "rates." *Morales*, 504 U.S. at 388, 112 S.Ct. at 2039. Commissions paid to travel agents are

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[15] Defendants argue that the breach of good faith claims are preempted in their Reply Brief.

operating costs for airlines. To the extent an airline is able to reduce its operating costs, the airline places itself in a position to pass these savings along to the consumers in the form of lower rates for airfare. Thus, any change in an airline's commission practices necessarily has a significant impact upon the fares they charge. Consequently, this Court must conclude that the plaintiff's causes of action related to the SABRE agreement negotiations have a connection with American's "rates" and "services."

Having determined that the plaintiff's claims relate to "rates" and "services," this Court must next consider whether the plaintiff's causes of action constitute the "enact[ment] or enforce[ment]" of a state law under the ADA. In *Wolens*, the Supreme Court determined that the Illinois Consumer Fraud Act was preempted by the ADA because it allowed the state to "police the marketing practices of the airlines." *Wolens*, 513 U.S. at 227. However, the Supreme Court explained that a party seeking relief from an airline that "dishonored a term the airline itself stipulated" will not generally be preempted since the ADA will permit "state-law based court adjudication of routine breach of contract claims." *Id.* at 232-33. Nevertheless, the Court later clarified its decision by noting that contract actions will be preempted where a party seeks to enlarge or enhance the parties' agreement "based on state laws or policies external to the agreement." Id.

Here, the plaintiff's causes of action do not seek relief from the defendants because of the breach of a self-imposed undertaking or because they "dishonored a term" in a contract that they themselves had stipulated. Instead, this is a case where the plaintiff seeks to enlarge or enhance the parties agreements by obtaining relief based on state laws and policies external to the agreement. It is

undisputed that FCI is bound by the terms of the Airline Reporting Corporation Agreement ("ARC Agreement") between American and FCI. An addendum to that agreement provides in pertinent part, that "American, in its sole discretion, reserves the right to modify its commission schedule from time to time and at any time." App. to Def.'s Mot. for Summ. J., Ex. B-1 at F 00918, par. 2(a). Thus, the commission caps imposed by American do not breach a term that American imposed upon itself. Indeed, the language in the ARC Agreement expressly permits American to modify its commission schedule "at any time."

The fact that the defendants did not breach a self-imposed term in their SABRE agreement with FCI is further corroborated by FCI's own employees. For example, FCI's CEO, Sandra Sedgewick admitted that no one from American ever promised to keep its commission structure unchanged. Sandra Sedgewick Dep. 20:1-5. Further, Stephen Sedgewick, President of FCI, admitted in his deposition that there were no written agreements included in the SABRE agreement that were breached by the defendants. Stephen Sedgewick Dep. 103:10-14.

In this case, the plaintiff cannot point to any provision in the SABRE agreement or the ARC agreement that was breached by the defendants. Instead, the plaintiff seeks to invoke state laws and policies external to the agreement. *Wolens*, 513 U.S. at 233. Plaintiff relies on allegations that defendants breached the duty of good faith and fair dealing, and engaged in fraud, misrepresentations and violations of the DTPA by failing to advise FCI of its plans to change its commission structure. "State causes of action are available to enforce bargains for services into which an airline voluntarily entered, but may not be used to impose external requirements upon the airlines. . . . " *Trujillo v.*

American Airlines, Inc., 938 F.Supp 392, 394 (N.D. Tex. 1995), *aff'd*, 98 F. 3d 1338 (5th Cir. 1996); *See Stone v. Continental Airlines, Inc.*, 905 F.Supp. 823, 826 (D. Haw. 1995) (plaintiff's implied breach of warranty claim was preempted by the ADA because it was not expressly agreed to by the airline)

In addition, it is abundantly clear that the plaintiff's DTPA claims are preempted under the ADA. Recently, the Fifth Circuit explained that "Wolens leaves no doubt that the Texas Deceptive Trade Practices-Consumer Protection Act is preempted by the ADA, especially as it relates to an airline's rates, routes, or services." *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 931 (5th Cir. 1997).

In sum, plaintiff's state law claims for tortious interference,[16] deceptive trade practices, common law fraud, and breach of the duty of good faith and fair dealing are related to American's "rates" and/or "services." The claims related to discounts on airfare, including those made contingent upon the use of the SABRE CRS, all related to "rates" because they reduce the cost of airfare. Further, any claims based upon the SABRE CRS system relate to American's reservation system, which is part of its "services." Plaintiff's claims arising out of America's [sic] modifications are related to American's ticketing "services" and have a significant effect upon American's "rates." Moreover, none of the plaintiff's claims are for physical injuries or damage to property that resulted from the operation or maintenance of an aircraft. *Hodges*, 44 F.3d at

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[16] Except the tortious interference and conspiracy claims involving Mary Earhart's covenant to not compete.

338. Finally, the plaintiff's contract related claims do not rely on terms the airline voluntarily agreed to, but instead seek to enlarge the parties agreement based upon principles of state law and public policy. Consequently, the plaintiff's state law claims for tortious interference,[17] deceptive trade practices, common law fraud, and breach of the duty of good faith and fair dealing are preempted by the ADA.

C. Tortious Interference With Earhart's Covenant To Not Compete

To prevail on a claim for tortious interference with contract, FCI must prove (1) a contract subject to interference exists, (2) that the alleged interference was intentional, (3) that the willful and intentional act proximately caused the plaintiff's damages, and (4) that FCI sustained actual damages or losses. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d. 426, 430 (Tex. 1997).

In their motion for summary judgment, defendants argued that FCI cannot prove the requisite intent to interfere with Earhart's contract because there is no evidence that defendants were aware that Earhart had a covenant to not compete. Brief in Support of Def.s' Mot. for Summ. J., p. 18-19; Def.s' Reply, p. 9. As summary judgment movants, the defendants are initially responsible for informing the court of the basis of their motion and showing there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d

[17] Except of tortious interference and conspiracy claims involving Mary Earhart's covenant to not compete.

265 (1986). This burden may be satisfied by showing that there is an absence of evidence to support any essential element of the nonmoving party's claims. *Id.* at 325. Here, by pointing out the absence of evidence to show that defendant's [sic] knew about Earhart's employment agreement, the defendants satisfied their burden and highlighted the absence of evidence to establish the second element in FCI's claim, i.e., that defendant's intentionally interfered with Earhart's agreement with FCI.

Once the movant meets this burden, the nonmovant must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. *Lechuga v. Southern Pac. Transp. Co.*, 949 F.2d 790, 794 (5th Cir. 1981); FED.R.CIV.P. 56(e) The purpose of this requirement is not to "replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." *Lujan*, 497 U.S. 888. Here, in an effort to establish the requisite intent on the part of the defendants, FCI relies on the affidavit of Steve Sedgewick. Pl.'s Brief in Resp. to Mot. for Summ. J., p. 7. In his affidavit, Sedgewick testified that "[a]ny person reasonably familiar with the travel industry would have known, or should have known, that Mary [Earhart] was under a non-compete clause. Id., App., Ex. 1, p. 25. This conclusory allegation is not sufficient for FCI to comply with its obligation under Rule 56(e) to set forth specific facts showing a genuine issue for trial. By relying solely on the Sedgewick affidavit to establish that defendants intentionally interferred [sic] with Earhart's covenant, FCI has merely replaced the conclusory allegations in their complaint with conclusory allegation of an affidavit. *Lujan*, 497 U.S. at 888. This Court will not presume the missing specific facts to support FCI's claim because without them, the Sedgewick affidavit would not establish

the injury that FCI generally alleges. *Id.* Accordingly, the undersigned grants the defendants' motion for summary judgment on this claim.[18]

D. FCI's Breach of Contract Claim

Defendants argue they are entitled to summary judgment on FCI's breach of contract claim because FCI has not pointed to any term in the parties' written contract that has been breached by the defendants. Brief in Support of Mot. for Summ. J., p. 24. In response, to defendants' motion, FCI has not come forward with any contractual provisions in the parties' written contract that were breached by the defendants. As explained above, under Rule 56(c), when a summary judgment movant points to the absence of evidence to support the nonmoving party's claims, it becomes incumbent upon the nonmoving party to set forth specific facts showing there is a genuine issue for trial. Here, the nonmoving party, FCI, has failed to point to a contractual provision that was breached by the defendants. Thus, the undersigned can find no basis to support FCI's allegation that the defendants breached their contract with FCI. *Thanksgiving Tower Partners v. Anros Thanksgiving Partners*, 64 F.3d 227, 230-31 (5th Cir. 1995) (movant entitled to summary judgment on breach of contract claim where nonmovant could not point to language in the parties' contract to support its claim).[19]

---

[18] Defendants are also entitled to summary judgment on FCI's conspiracy claims to the extent the conspiracy allegations arise out of Earhart's covenant to not compete.

[19] In addition, as explained previously, the language in the ARC Agreement expressly authorized the defendants to modify their

(Continued on following page)

In sum, the undersigned can find no basis to support FCI's allegation that the defendants breached their contract with FCI. Accordingly, the undersigned grants the defendants' motion for summary judgment on this claim.

E. SABRE'S Counterclaim

Intervenor SABRE argues that it is entitled to summary judgment on its counterclaim. However, because this Court finds that there are genuine issues of material fact surrounding this claim, SABRE's motion is denied.

III. Conclusion

Defendant's and Intervenor's Motion for Summary Judgment is **GRANTED** as follows: (1) **GRANTED** as to FCI's claims for conspiracy and tortious interference with Earhart's covenant to not compete and those claims are **dismissed with prejudice**; (2) **GRANTED** as to FCI's claims for breach of contract and this claim is **dismissed with prejudice**; and (3) **GRANTED** as to FCI's claims for conspiracy, tortious interference (except those based on Earhart's covenant), deceptive trade practices, common law fraud and breach of good faith based on this court's finding that those claims are preempted by the ADA.[20] The

---

commission schedule at any time. Thus, FCI's breach of contract claim is without to the extent it is based on the modification of the commission schedule.

[20] It is well-settled that the ADA does not provide a private right of action. *Sam L. Majors Jewelers*, 117 F.3d at 924. However, this does not mean that the plaintiff's claims are without merit. If the plaintiff wishes to pursue its claims further, it may complain to the appropriate administrative agency. *Statland v. American Airlines, Inc.*, 998 F.2d

(Continued on following page)

Intervenor's Motion for Summary Judgment on its breach of contract claim is **DENIED**.

Having granted in part the Defendant's and Intervenor's Motion for Summary Judgment, the only remaining claim is SABRE's breach of contract claim. In the interests of judicial economy, the undersigned **VACATES** the trial setting and abates this cause of action pending a ruling by the appropriate administrative agency.

For the foregoing reasons, the undersigned **ORDERS** that the **Defendant's and Intervenor's Motion for Summary Judgment**, filed October 2, 1997, be **GRANTED** in part.

Signed this 2nd day of December, 1997

/s/ Jane J. Boyle
UNITED STATES MAGISTRATE JUDGE
Jane J. Boyle

539, 542 (7th Cir.), *cert. denied*, 114 S.Ct. 603, 126 L.Ed.2d 568 (1993) (plaintiff may complain to the Department of Transportation); *Anderson v. USAir, Inc.*, 818 F.2d 49, 55 (D.C. Cir. 1987) (plaintiff can pursue claims before the DOT or FAA); *Lawal v. British Airways, PLC*, 812 F.Supp. 713, 721 (S.D. Tex. 1992) (same); *Howard v. Northwest Airlines, Inc.*, 793 F.Supp. 129, 132-33 (S.D. Tex. 1992) (same).

2002 U.S. App. LEXIS 9115

LYN-LEA TRAVEL CORP, doing business as First Class International-Travel Management, Plaintiff-Counter-Defendant-Appellant v. AMERICAN AIRLINES INC; Defendant-Counter-Claimant-Appellee, SABRE GROUP INC, Intervenor Defendant-Counter-Claimant-Appellee

No. 00-11174

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

April 29, 2002, Filed

Appeal from the United States District Court for the Northern District of Texas, Dallas.

Lyn-Lea Travel Corp. v. Am. Airlines, 283 F.3d 282, 2002 U.S. App. LEXIS 2338 (5th Cir. Tex. 2002).

JUDGES: Before JONES, SMITH, and DeMOSS, Circuit Judges.

OPINION: ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:
/s/ Edith H. Jones
United States Circuit Judge

Supreme Court, U.S.
FILED
OCT 23 2002
OFFICE OF THE CLERK

No. 02-167

In The Supreme Court of the United States

LYN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT,

Petitioners,

v.

AMERICAN AIRLINES, INC. and SABRE GROUP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit err in holding that the Airline Deregulation Act of 1978 preempts a travel agent's state law tort claims based on an airline's alleged failure to disclose that it planned to reduce the commissions it paid for the sale of airline tickets and on the airline's grant of discounts on air travel to certain travel agents and corporate purchasers of air travel? Does the ADA preempt state law tort and deceptive trade practice claims challenging airline marketing and pricing activities?

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BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

Respondents respectfully urge this Court to deny the petition for a writ of certiorari, which seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

A. Lyn-Lea's dealings with American and Sabre

Lyn-Lea operates a travel agency that sells airline tickets for many airlines, including American. Lyn-Lea is authorized to sell tickets for American pursuant to an addendum to the Airline Reporting Commission Reporting Agreement (the "ARC Agreement"). The ARC Agreement provides that American will pay commissions to Lyn-Lea according to American's published commission schedule. The ARC Agreement expressly permits American to modify its commission schedule "at any time and from time to time."

In late 1994, to expand its business, Lyn-Lea bought a travel agency called "Air-O Travel." During the negotiations, Lyn-Lea discovered that Air-O had executed a term contract with American's Sabre division to use the SABRE computer reservations system ("SABRE"). Lyn-Lea was already contractually obligated to use WorldSpan, a competing computer reservations system. Lyn-Lea intended to honor its agreement with WorldSpan, and did not want to assume responsibility for Air-O's commitment to use SABRE. Consequently, Lyn-Lea began negotiating directly with American's Sabre division in an effort to reduce Lyn-Lea's overall commitment to use SABRE.

On December 7, 1994, Lyn-Lea and Sabre signed an agreement (the "CRS Agreement") that supplanted the Air-O agreement. The CRS Agreement provided that Sabre would supply Lyn-Lea with four computer terminals (rather than eight as required by the Air-O agreement), and that if Lyn-Lea reached certain performance goals, it could avoid the stipulated monthly use charges.

On February 10, 1995, American announced that, beginning February 27, 1995, American would cap its base commissions at $25 for one-way tickets and $50 for round-trip tickets. Lyn-Lea contends that American "knew" at the time it negotiated the CRS Agreement that it was going to reduce the commissions it paid for the sale of airline tickets, that state law imposed a duty on American to advise Lyn-Lea of this fact when negotiating the CRS Agreement, and that American failed to disclose its plans to Lyn-Lea.

After American's commission reduction, Lyn-Lea diminished and then ceased using SABRE, which triggered monthly usage charges under the CRS Agreement. Sabre sent Lyn-Lea an invoice requesting some $20,000 owed under the CRS Agreement, which Lyn-Lea did not pay. Consequently, Sabre terminated the CRS Agreement and demanded $102,079.17, the accrued amount owed thereunder. Shortly after that demand, Lyn-Lea filed this action.

B. American's dealings with third parties

In early 1997, Lyn-Lea entered into an exclusive booking agreement with MAI Systems ("MAI"). MAI had an existing direct agreement with American granting MAI a discount on American flights provided they were booked

on a Sabre CRS system. Lyn-Lea requested that American waive this condition for MAI, but American declined to do so. Lyn-Lea asserts that American's refusal to waive this term of the American-MAI contract amounts to tortious interference with Lyn-Lea's relationship with MAI.

In addition, Lyn-Lea contends that American utilized "waivers and favors"[1] to "steal" Lyn-Lea's client, Mendoza Dillon. Specifically, Lyn-Lea claims that by granting Nick Lugo Travel, a competing travel agency, favorable discounts in corporate fares, American enabled Nick Lugo to induce Mendoza Dillon to switch agencies. As with American's dealing with MAI, Lyn-Lea asserts that American's grant of those corporate discounts amounted to tortious interference with Lyn-Lea's relationship with Mendoza Dillon.

C. Proceedings in the courts below

Lyn-Lea claims that American's actions constitute intentional interference with business relationships and conspiracy, breach of contract, violations of the Texas Deceptive Trade Practices Act (the "DTPA"), fraud and misrepresentation. While the suit was pending, Sabre was "spun off" from American and assigned all of its rights under the CRS Agreement; Sabre thus became an independent party to the lawsuit.

---

[1] These are special accommodations granted a customer such as waiving restrictions (e.g., a Saturday night stay) on lower-priced tickets. In short, they are a particular form of discount that allows a travel agent to let certain customers pay less than the "list" price for airline tickets.

By order dated December 2, 1997, the district court granted American summary judgment as to all of Lyn-Lea's claims, in part on the grounds that the claims were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1). Pet. App. 30-55. Specifically, the district court held that Lyn-Lea's claims for tortious interference and conspiracy, violations of the DTPA, fraud and misrepresentation, and breach of the duty of good faith and fair dealing were preempted by the ADA. Significantly, the district court also granted summary judgment that Lyn-Lea's claims for breach of the CRS Agreement lacked evidentiary support.

Lyn-Lea did not appeal the district court's order on the merits of its breach of contract claim. The Fifth Circuit affirmed the remainder of the summary judgment on preemption grounds. Pet. App. 1-21.

REASONS TO DENY THE WRIT

This Court should deny Lyn-Lea's petition because this case presents a plain-vanilla application of preemption under the Airline Deregulation Act. Far from applying ADA preemption to "commercial conduct unrelated to air travel," as Lyn-Lea contends, the Fifth Circuit correctly found that Lyn-Lea's claims are preempted because they seek to impose state law constraints on American's practices and policies for marketing and selling air travel. Specifically, Lyn-Lea seeks to impose a supposed state law duty on American affirmatively to forewarn travel agents of its contemplated future marketing mechanisms and commission structures to sell air travel. Lyn-Lea also challenges the terms pursuant to which American sold air

travel to corporate customers. Accordingly, Lyn-Lea's claims squarely conflict with the purpose of the ADA, which is to "leave largely to the airlines themselves, and not at all to the States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228, 115 S.Ct. 817, 823 (1995).

Lyn-Lea points to disagreement among the circuits regarding whether the ADA preempts state-law personal injury claims based on issues such as smoking rules, injuries from falling baggage, and false imprisonment, but this case neither implicates that disagreement nor presents an opportunity for this Court to clarify the definition of "services." Regardless of whether the ADA preemption clause is construed narrowly or broadly over time, it will necessarily capture the claims at issue here, which relate directly to the means by which airlines market, distribute, and sell air travel, and thereby compete with one another.

A. The core of the ADA preemption clause is to prevent the States from indirectly regulating airline competition.

The ADA itself and this Court's interpretation of it make clear that a primary inquiry in ADA preemption cases is whether the state law at issue has a significant effect on the economics of competition among airlines. This Court first interpreted the preemption clause in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992). Discussing the history of the ADA and its stated purpose, this Court noted that Congress' focus was on the economic aspects of deregulation. *Morales*, 504 U.S. at 378, 112 S.Ct. at 2034 (noting that Congress determined that "'maximum reliance on competitive market forces'

would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality ... of air transportation services'") (*quoting* 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)).

The Court went on to hold that certain state-law regulations regarding airfare advertising were preempted because of their significant effect on the economics of airline rates:

> [I]t is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares. Advertising serves to inform the public of the prices of products and services, and thus performs an indispensable role in the allocation of resources. Restrictions on advertising serve to increase the difficulty of discovering the lowest cost seller and reduce the incentive to price competitively.

Morales, 504 U.S. at 388, 112 S.Ct. at 2039 (internal citations omitted). The Court made it clear that the outcome of a preemption inquiry vis-à-vis airline rates depends on the substantive relation of the state law to the rates, and not strictly on just how sweeping the term "relating to" is construed as it appears in the ADA preemption clause.

This Court construed the ADA preemption clause again in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995). *Wolens*, like *Morales*, focused on economics and held that certain state laws were preempted because they limited airlines' marketing practices: "In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of

air transportation services, we conclude that § 1305(a)(1) preempts plaintiffs' claims under the Consumer Fraud Act." *Wolens*, 513 U.S. at 228, 115 S.Ct. at 823-824. Again, the Court's decision to preempt the state law was based on the law's relation to economic competition among airlines and not strictly on the precise breadth of the term "relating to."

Like the Attorney Generals' advertising guidelines in *Morales*, Lyn-Lea seeks to impose state law limits on airlines' marketing practices. Lyn-Lea's tortious interference claim challenges American's practices of charging different rates to different customers and granting certain travel agents the ability to offer special discounts. For example, this Court has held that ticket restrictions such as day-of-week restrictions bear a "reference to airfares," *Morales*, 504 U.S. at 388, 112 S.Ct. at 2039, yet Lyn-Lea's torticus interference claim is based on American allowing another travel agent to waive restrictions such as a Saturday night stay for certain corporate customers.

Similarly, Lyn-Lea's fraud claim seeks to impose state law duties on airlines to disclose their plans for how, and on what terms, to market air travel through travel agents. According to Lyn-Lea, American was obliged to tell Lyn-Lea, in advance, that it planned to implement a cap on travel agent commissions for sales of airline tickets.[2] In its summary judgment order, the district court explained that, as a matter of basic economics, reductions in commissions have a significant effect on airline rates:

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[2] Ironically, Lyn-Lea and other travel agents took the position in a nation-wide class action lawsuit that advance announcements by airlines of upcoming commission cuts constituted price-fixing in violation of federal anti-trust statutes.

> Commissions paid to travel agents are operating costs for airlines. To the extent an airline is able to reduce its operating costs, the airline places itself in a position to pass these savings along to the consumers in the form of lower rates for airfare. Thus, any change in an airline's commission practices necessarily has a significant impact upon the fares they charge.

Pet. App. 47-48. The commission reduction has a particularly significant effect when the variable cost to be reduced is 10% of the total sales price, which was the case at the time the CRS Agreement was negotiated.

Even more directly than state laws aimed at fare advertising, Lyn-Lea's common-law and statutory claims interfere with the economic aspects of the airline business, because at their core they seek to impose state law limits on how much American charges particular customers for airline tickets, and how American pays travel agents for the sale of tickets. This case "plainly does not present a borderline question." *See Morales*, 504 U.S. at 390, 112 S.Ct. at 2040. There cannot be a more clear relation between the state law at issue and American's rates.

B. This case is not about CRS services or breach of contract.

Lyn-Lea tries to paint the Fifth Circuit as having applied preemption to areas far afield from core airline economic competition. That contention is contrary to the record. First, the district court granted summary judgment on the merits that neither American nor Lyn-Lea breached the CRS Agreement, and Lyn-Lea did not appeal that decision. Second, it is irrelevant to Lyn-Lea's claims that Sabre as a CRS provider allows for booking

non-airline matters such as rental cars and hotels. Lyn-Lea's claims do not involve Sabre or American's practices with respect to rental cars or hotels. What Lyn-Lea complains about is that American did not tell Lyn-Lea in advance that it might reduce the commissions it paid for the sale of air travel, and that American's grant of discounts on air travel caused certain customers to purchase air travel through a travel agency other than Lyn-Lea.

Nor does this case fall within the *Wolens* category of "routine breach of contract claims" that are not subject to preemption, because Lyn-Lea makes no claim that American failed to live up to some voluntarily-undertaken obligation. As stated above, Lyn-Lea did not appeal the district court's summary judgment on the merits of its claim for breach of the CRS Agreement. Further, Lyn-Lea does not challenge the plain language of the ARC Agreement granting American the express right to change commissions "at any time and from time to time." Instead, Lyn-Lea seeks to impose on American an obligation found nowhere in the ARC Agreement (or any other agreement), but rather created (if at all) wholly by "state laws or policies external to the agreement." *See Wolens*, 513 U.S. at 233, 115 S.Ct. at 826. Specifically, Lyn-Lea seeks to impose on American a state-law duty to have disclosed its upcoming commission change while it was negotiating the CRS Agreement.[3] While it may be difficult to draw a

[3] Although neither the district court nor the Fifth Circuit found it necessary to reach the issue, in fact, such a duty does not exist at common law, because there is no fiduciary or special relationship between the parties. *See Bado Equip. Co., Inc. v. Bethlehem Steel Corp.*, 814 S.W.2d 464, 475 (Tex. App. – Houston [14th Dist] 1991, no writ).

meaningful line between breach of contract and fraud in some instances, Lyn-Lea's claims here fall squarely within the preemption territory this Court defined in *Wolens*.

C. Any disagreement between the Circuits is not implicated here.

Lyn-Lea argues that the circuit courts disagree as to how broadly the term "services" should be construed as it appears in the ADA preemption clause, and that this Court should use this case as a vehicle to provide a "closer working out" of the issues in those cases. Petition at 10-11. Indeed, three members of this Court previously noted a disagreement among the circuit courts, and argued that this Court should grant certiorari in a case in order to provide guidance on certain preemption issues. *Northwest Airlines, Inc. v. Duncan*, ___ U.S. ___, 121 S.Ct. 650 (2000). This is not the right case to provide that guidance, because this case involves purely economic issues.

A review of the cases cited in Lyn-Lea's petition as reflecting a disagreement among the circuits demonstrates that the area of disagreement involves non-economic activities, and whether they fall within the ADA's definition of "services." For example, *Duncan* involved airline smoking rules, and whether a flight attendant's suit for damages from second-hand smoke related to airline "services" for preemption purposes. *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 650 (2000). Similarly, the case in which the Ninth Circuit adopted a narrow definition of "services" involved five consolidated suits by airline passengers for personal injuries caused by beverage carts,

luggage, or falls. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-1266 (9th Cir. 1998) (*en banc*). The Fifth Circuit's seminal case defining "services" involved personal injuries suffered when a case of rum fell from an overhead compartment. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 337 (5th Cir. 1995) (*en banc*). Other cases involve defamation claims arising out of ticketing practices and complaints about a passenger who failed to show identification being refused the right to board a flight. *Taj Mahal Travel v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998); *Smith v. Comair*, 134 F.3d 254 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996). The "services" at issue in those cases thus involved not economic issues, but rather basic activities involved in flights: storing luggage, providing food and drink, boarding practices, and the like.

Indeed, even under the Ninth Circuit's more restrictive standard of preemption – which asks whether "the state laws underlying the claims frustrate the goal of economic deregulation by interfering with the forces of competition" – Lyn-Lea's claims would be preempted because they seek to impose state law restraints on airline pricing and marketing practices. *Charas*, 160 F.3d at 1263. Because the issues in this case involve strictly economics and competition, this case does not present an appropriate vehicle for this Court to provide guidance to the circuit courts regarding the term "services."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-167

Supreme Court U.S.
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LYN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT,

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR REPLY

Lyn-Lea Travel Corp. d/b/a First Class International Travel Management ("Lyn-Lea Travel") replies to two aspects of the Brief filed by respondents American Airlines, Inc. and Sabre Group, Inc. (jointly "Sabre"), which are directed at convincing the Court that, even if it does agree with Lyn-Lea Travel that Airline Deregulation Act pre-emption should be revisited and clarified, this particular case is not the proper vehicle for that review.

First, Sabre creates a revisionist history of the record in this case, to support its theory that the Court should not use this particular set of facts to revisit pre-emption. Lyn-Lea Travel wishes to correct the record.

Second, Sabre creates a legal construct of pre-emption jurisprudence that is both artificial and incorrect, in another effort to persuade the Court that this case does not involve a conflict of circuits. Lyn-Lea Travel will briefly explain why this construct fails.

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Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996) 5

STATUTE

49 U.S.C. § 41713(b) 1

COMMENTARY

Daniel H. Rosenthal, Note, *Legal Turbulence: The Court's Misconstrual of the Airline Deregulation Act's Preemption Clause and the Effect on Passengers' Rights*, 51 DUKE L.J. 1857 (2002) 1

REPLY BRIEF

Lyn-Lea Travel Corp. d/b/a First Class International Travel Management ("Lyn-Lea Travel") replies to the Brief in Opposition ("Sabre Brief") filed by respondents American Airlines, Inc. and Sabre Group, Inc. (jointly "Sabre").

Sabre says that this case "plainly does not present a borderline question," quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992). Sabre Brief at 8.

Lyn-Lea Travel agrees. The extent and nature of pre-emption in this case goes beyond anything in the jurisprudence of the Court and earlier cases of the lower courts.

In this case, the Court therefore has the opportunity to clarify the reach of pre-emption under the Airline Deregulation Act, 49 U.S.C. § 41713(b) ("ADA"). At least one commentator has urged that the Court revisit this issue. Daniel H. Rosenthal, Note, *Legal Turbulence: The Court's Misconstrual of the Airline Deregulation Act's Pre-emption Clause and the Effect on Passengers' Rights*, 51 DUKE L.J. 1857 (2002).

This is a good case to use for clarification because it well illustrates how pre-emption can frustrate the purpose of the ADA – "to promote 'maximum reliance on competitive market forces.'" *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995). In this case, Lyn-Lea Travel alleges that Sabre – essentially a very large travel agency – competed against the far-smaller Lyn-Lea Travel in a variety of wrongful ways.

Competition is not enhanced when market forces are out of balance. Here, the results of the rulings below are that Sabre can sue Lyn-Lea Travel for what it claims are problems with its commercial relationship with Lyn-Lea

Travel, but Lyn-Lea Travel cannot respond with its own claims arising out of that same relationship.

Sabre does not really urge pre-emption. Sabre wants complete immunity.

ARGUMENT

1.

Sabre miscasts the record.

The record below is bereft of any actual evidence that allowing Lyn-Lea Travel its state-law based claims would have the "forbidden significant effect" on the price, routes, or services of an air carrier that the Court condemned in *Morales*, 504 U.S. at 391. This problem is particularly acute with respect to Sabre, which is now independent of American Airlines. App. 4, fn. 2.

The ADA does not support the broad pre-emption applied by the lower courts in this case, because any effect is too insignificant.

Sabre insists that this position is "contrary to the record." Sabre Brief at 8. However, Sabre does not provide a single record citation to support this allegation, nor does Sabre otherwise provide record support for other allegations it makes, many of which are in truth refuted by the record.

For example, Sabre advises the Court that "the district court granted summary judgment on the merits that neither American nor Lyn-Lea breached the CRS [Computer Reservation System] Agreement." Sabre Brief at 8. This is simply wrong.

There is nothing in the record to support the statement that the district court held that Lyn-Lea Travel did

not breach the CRS Agreement. In fact, the district court expressly denied Sabre's motion for summary judgment on its counterclaim for breach against Lyn-Lea Travel. App. 54.

Sabre tells the Court that Lyn-Lea Travel agreed to add the Sabre CRS to its existing CRS (owned by a competitor to Sabre) "in an effort to reduce Lyn-Lea's overall commitment to use SABRE." Sabre Brief at 1. This is also untrue, because at that time Lyn-Lea Travel had no commitment to use Sabre. App. 31.

Sabre says that "it is irrelevant to Lyn-Lea's claims that Sabre as a CRS provider allows for booking non-airline matters such as rental cars and hotels." Sabre Brief at 8-9. This also miscasts the record. Lyn-Lea Travel has consistently argued that the scope of the ADA pre-emptive effect must be considered against the fact that the Sabre CRS has no effect at all on air travel operations, when it is used to book other travel operations such as hotel rooms or rental cars. *See* App. 3, fn. 1.

Sabre refers (again without a record cite) to a class action by "Lyn-Lea and other travel agents," apparently in an effort to paint Lyn-Lea Travel as an inconsistent and frequent litigant. Sabre Brief at 7, fn. 2. Presumably, Sabre refers to a suit brought against American Airlines and other airlines for price fixing. Lyn-Lea Travel was not a named party to that lawsuit and did not actively participate in it. As a member of the class, Lyn-Lea Travel did benefit somewhat from the settlement in that case. However, Lyn-Lea Travel never took the position attributed to it by Sabre.

Any detailed discourse on the record must await full briefing, if the Court grants Lyn-Lea Travel's Petition. The

point Lyn-Lea Travel seeks to make here is that the Court cannot take unsupported factual assertions by Sabre as the truth.

2.

Sabre confuses the issues.

Sabre spends nearly one-third of its Brief arguing that the "core of the ADA pre-emption clause is to prevent the States from indirectly regulating airline competition." Sabre Brief at 5-8. That is quite true, but it is irrelevant in this case.

This case is not about a State effort to regulate airline competition. Instead, this case involves the simpler issue whether "a company's wrongful actions in commercial conduct unrelated to air travel" are pre-empted by the ADA. Petition at 1.

Sabre essentially concedes that there is a conflict of circuits regarding the scope of ADA pre-emption. Sabre Brief at 10. In an attempt to avoid this conflict, Sabre claims that the Court can draw a clear line between "economic" actions – which Sabre says are pre-empted – and "non-economic" actions – which Sabre says is where the conflict of circuits lies.

This is not a distinction at all, and one need go no further than *Wolens* to see why. The Court held that the ADA did not pre-empt enforcement of state contract law. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995). However, state contract law is intrinsically "economic" in nature.

The ADA does not speak of "economics." It uses more narrow words, pre-empting state laws that are "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b). In this case, prices and routes are not at issue, so the sole issue is the meaning of "service of an air carrier that may provide air transportation."

The conflict of circuits is indisputably related to the scope of "service" that may be pre-empted, as discussed in *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000). Nonetheless, Sabre tries to explain the conflict by characterizing some of the conflicting cases as non-economic in nature. Sabre Brief at 11, citing *Taj Mahal Travel v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998); *Smith v. Comair*, 134 F.3d 254 (4th Cir. 1998); and *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996).

Sabre's effort fails because all three cases involve the most fundamental economic aspect of the airline business – charging money to fly a passenger between two points. *Taj Mahal Travel* involved the sale of airline tickets. 164 F.3d at 187. *Comair* involved a passenger who was denied boarding. 134 F.3d at 256. *Travel All Over the World* also involved the sale of airline tickets. 73 F.3d at 1428.

All issues involving the ADA will be economic in nature, because the ADA was an economic act. However, the question in all these cases is whether a specific "service" is pre-empted. An airline's actions directly relating to air travel services are not pre-empted, according to these cases. However, according to the courts below, Lyn-Lea Travel's claims against Sabre relating to the Sabre CRS are pre-empted.

Thus, Sabre's economic/non-economic dichotomy fails to explain away the conflict of circuits.

Moving from economics to marketing, Sabre also asserts (again without record support) that Lyn-Lea Travel "seeks to impose state law limits on airlines' marketing practices." Sabre Brief at 7. At the outset, this is demonstrably false, because nothing in this case suggests any effort to regulate American Airlines' marketing practices with respect to air travel.

Lyn-Lea Travel does not seek to regulate the marketing practices of Sabre, but rather to address Sabre's deliberate and intentional actions directed at Lyn-Lea Travel, not at the marketplace.

Even if marketing practices were at issue, the dispute in *Wolens* related to a true marketing practice – American Airlines' efforts to revise its frequent flier program. *Wolens*, 513 U.S. at 224-225. The Court allowed a contract-based claim about those marketing practices to continue, which it could not have done had all marketing practices claims been pre-empted.

Sabre goes further off course when it argues that Lyn-Lea Travel "seeks to impose a supposed state law duty" on Sabre. Sabre Brief at 4. The duty to which Sabre refers is the duty to disclose terms known to Sabre at the time Lyn-Lea Travel and Sabre were negotiating the Sabre CRS Agreement. Sabre Brief at 9. This is the basis for Lyn-Lea Travel's affirmative claim for fraudulent inducement. As the Court of Appeals noted, fraudulent inducement "is related to the fundamental issue in contract actions: is there an enforceable agreement?" App. 14. Thus, the claim merely relates to contract formation. Lyn-Lea Travel does not, as Sabre represents to the Court, seek "to impose

state law duties on airlines to disclose their plans for how, and on what terms, to market air travel through travel agents." Sabre Brief at 7.

None of Sabre's various side trips address the fact that there is a conflict of circuits on the nature and extent of ADA pre-emption relating to "service of an air carrier that may provide air transportation," or the fact that Lyn-Lea Travel is the victim of that confusion.

CONCLUSION

For the reasons set forth herein and in the Petition, writ of certiorari should issue.

Respectfully submitted,

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